



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

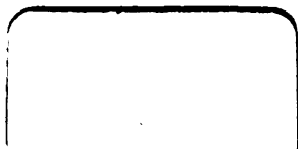
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



1927









Mar 4

13

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF OHIO

BY

LEVI J. BURGESS

REPORTER

NEW SERIES  
VOLUME XLVI

---

CINCINNATI  
ROBERT CLARKE & CO.  
1890

---

Entered according to Act of Congress, in the year 1890,  
BY LEVI J. BURGESS, FOR THE STATE OF OHIO,  
In the Office of the Librarian of Congress at Washington.

---

*Rec. May 28, 1890.*

JUDGES OF THE  
SUPREME COURT OF OHIO,

For the time commencing June 19, 1888, and ending February 9, 1889.

HON. SELWYN N. OWEN, CHIEF JUSTICE	}	<i>Judges.</i>
HON. FRANKLIN J. DICKMAN,		
HON. THAD. A. MINSHALL,		
HON. WILLIAM T. SPEAR,		
HON. MARSHALL J. WILLIAMS,		

---

*Attorney-General,*  
HON. D. K. WATSON.

JUDGES OF THE  
SUPREME COURT OF OHIO,

For the time commencing February 9, 1889, and ending December 21, 1889

HON. THAD. A. MINSHALL, CHIEF JUSTICE	}	<i>Judges.</i>
HON. FRANKLIN J. DICKMAN,		
HON. WILLIAM T. SPEAR,		
HON. MARSHALL J. WILLIAMS,		
HON. JOSEPH P. BRADBURY,		

---

*Attorney-General.*  
HON. D. K. WATSON.

*Clerk,*  
URBAN H. HESTER.

*Deputy Clerk,*  
HORACE M. CROW.

*Docket Clerk,*  
ELMER T. BOYD.

*Law Librarian,*  
FRANK N. BEEBE.

*Assistant Librarian,*  
EDGAR B. KINKEAD.

*Reporter,*  
LEVI J. BURGESS.

(iv)

# RULES.

---

## RULE I.

### SESSIONS IN TERM.

The regular public sessions of the Supreme Court shall be held in the Supreme Court Room, in the Capitol, on Tuesday and Thursday of every week during the term of the Court, commencing at ten o'clock a. m., on Tuesdays, and nine o'clock a. m., on Thursdays, and only on other days of the week by special assignment, as the convenience of business may require it.

And the sessions in the Consultation Room shall be between the hours of nine o'clock a. m., and six o'clock p. m.

## RULE II.

### ORDER OF BUSINESS.

The business of the General Docket shall be proceeded in as follows :

§ 1. On the opening of Court, on the first day of the stated term, the first seventy-five causes on the docket will be called, and afterwards the further call of the docket will be proceeded with on the first Tuesday of each month during the session of Court to the extent of seventy-five causes more on each day, in the order in which they appear on the docket, provided a sufficient number have not already been called to occupy the attention of the Court during the ensuing month.

§ 2. Any cause may be submitted, however, on behalf of either or both parties at any time, whatever may be its place on the docket.

§ 3. When a cause is called on the docket, and neither party appears in person or by attorney, it shall be marked submitted, and when reached for decision, shall be disposed

(v)

of as the court shall deem fit and proper, according to the state and condition of the cause.

§ 4. Causes will be taken up for decision in their order on the docket, and not otherwise, except on motion duly filed; and, for special reason, a cause may be taken out of its order and assigned for hearing or decision at a particular time, as authorized by section 440, Revised Statutes.

§ 5. Parties desiring to be heard in oral argument, must notify the Court of that fact and have their causes set for oral argument at the time of the call of the causes on the docket, if not previously done; otherwise oral argument will be considered as waived.

§ 6. When a cause is reached for decision which has not been argued, and in which the plaintiff, or party having the affirmative, has filed no printed argument or brief, as required by Rule IV, the cause will be dismissed, remanded, or otherwise disposed of, at the discretion of the Court.

§ 7. The sessions of the Court, on Thursday of each week, will be devoted to the business of the motion docket.

§ 8. A motion for leave to file a petition in error shall not, without special leave of the Court, be orally argued beyond fifteen minutes on either side.

§ 9. Each party shall have half an hour for the oral argument of any cause or matter on the motion docket (except those specified in the last preceding clause); which time shall not be exceeded, unless the Court, for special reasons to be assigned before the hearing, shall extend the time.

§ 10. Five days before a cause is to be heard on oral argument, the opposite counsel must be furnished with a brief statement of the case, and the points intended to be made by counsel with a reference to any statutory provisions or adjudicated cases which may be relied on; and each member of the court and the reporter must be furnished with a copy the day before the oral argument. At the conclusion of the oral argument, time will not be given for the filing of briefs thereafter; and all cases assigned for oral argument must be submitted on the day they are assigned for such argument. (*As amended January 8, 1889.*)

§ 11. No motion to take a cause out of its order and advance it for hearing, will be entertained on the part of the plaintiff, until it is ready to be submitted by him, and when allowed, time will be given the defendant, not exceeding 60 days, in which to prepare and file his brief; nor, on the part of the defendant, until the record has been printed (unless dispensed with); and when allowed, the brief of the plaintiff must be filed in 60 days thereafter, and that of the defendant in 60 days after the expiration of the time allowed the plaintiff. If oral argument is desired by either party, notice must be given at or before the motion to take out of order is made; and in such case compliance will be required with Sec. 10, Rule 2, of the Rules of Practice. (*Adopted* May 1, 1889.)

§ 12. An application for an extension of time in which to file a brief in any cause after the same has been called, must be by motion and on notice to the opposite party; and ten minutes will be allowed each side on the hearing of the motion. But it may be submitted by either upon a written statement of the reasons for or against the delay. (*Adopted* January Term, 1890.)

### RULE III.

#### ORAL ARGUMENT.

When a cause on the general docket is argued orally, the time allowed for each side shall not exceed one hour, unless, for special reasons to be adduced before the argument commences, the Court shall extend the time.

### RULE IV.

#### BRIEFS AND TRANSCRIPTS.

No civil cause will be heard or considered, unless the plaintiff, or party holding the affirmative, shall have caused to be filed with the Clerk, for the use of the Court and Reporter, ten printed copies of so much of the record, testimony and documents therein, necessary to be considered by the Court, in octavo size, pamphlet form, and suitable for binding, with

index and marginal references (the cost of which printed copies shall be taxed as costs in the cause), and shall also have filed with the Clerk a like number of printed copies in like form of a brief or argument therein, *containing a statement of the questions presented, and a succinct statement of so much of the cause, referring to the pages of the printed record, as is necessary to show how the questions arise*, with marginal references to the headings and points made; and for want of such printed copies, unless good reason be shown to the contrary, the cause may be dismissed as for want of prosecution.

And no brief or argument on behalf of the defendant or party holding the negative will be read or considered, unless it be printed with like references, and a like number of copies filed with the clerk. A copy of the printed record, and briefs or argument, shall be furnished to opposite counsel a reasonable time before the cause will be heard, and proof of such service of records and briefs shall be filed with the Clerk.

## RULE V.

### PRINTING RECORDS, ETC.

It shall be the duty of the Clerk, on the written precept of either party, his or their attorney, to any suit pending in this Court, and on such party depositing with the Clerk such sum of money as may be reasonably necessary to defray the expenses, to make up from the files, in proper order to be printed for the purposes of the hearing or trial of the cause, a copy of the pleadings, exhibits, evidence and proceedings therein, preserving the date of the commencement of the action and the date of the filing of each pleading, dispensing with the formal captions, verifications and official certificates, where the same may not be material to the questions to be adjudicated, and to cause to be printed fifteen copies thereof for the use of this Court and the counsel in the cause; and the costs thereof, unless otherwise ordered by the Court, shall be taxed in the cost bill, and such disposition or application shall be made of the said deposit as to the Court shall seem equitable. Where the case is on error, the matter to be printed shall be in-



dictated by the party filing the precipe, in accordance with Rule IV.

## RULE VI.

### POINTS DECIDED.

A syllabus of the points decided by the Court, in each cause, shall be stated in writing by the Judge assigned to deliver the opinion of the Court, which shall be confined to the points of law arising from the facts of the cause that have been determined by the Court.

And the syllabus shall be submitted to the Judges concurring therein, for revisal, before publication thereof; and it shall be inserted in the book of reports without alteration, unless by the consent of the Judges concurring therein.

## RULE VII.

### APPLICATIONS IN ERROR.

When an application for leave to file a petition in error has been made in vacation to a Judge of the Supreme Court and disallowed, no other application therefor shall be made except to the Court in session.

## RULE VIII.

### NOTICE OF APPLICATIONS IN ERROR.

In cases where leave to file a petition in error is required by either the Court when in session or a Judge thereof in vacation, notice in writing of the intended application, briefly specifying the errors relied on, shall be given to the adverse party, or his attorney, at least ten days when made to the Court, and five days when made to a Judge, before the application shall be acted on, unless, in view of special circumstances attending the case, the Court or Judge should determine that justice required the time of such notice to be abbreviated or such notice to be dispensed with.

A copy of such notice, with the proof of the service thereof, and petition in error, shall accompany the application.

## RULE IX.

## RETURN OF PAPERS.

After the decision of a cause in the Supreme Court, in which a final record is not required to be made in that Court, the original papers shall be returned to the Clerk of the proper Court; when so returned, the Clerk of the Supreme Court shall seal them up and direct them to the Clerk of such Court, and forward them as said Clerk may in writing direct. If not so directed within a reasonable time, they may be sent by Express.

## RULE X.

## FILES OF CASES DISPOSED OF.

The papers in cases heretofore or hereafter disposed of (and not returned to the counties or withdrawn by leave of the Court) shall be filed away in convenient packages by the Clerk, with a label on each package, on which shall be written or printed, "Cases Decided," "General Docket," or "Motion Docket," (as the case may require), and also the term at which the same were disposed of, and the numbers of the cases in each package; which numbers shall correspond with those of the docket of said term.

The papers in cases on the General Docket shall be put in separate packages from those on the Motion Docket, and the papers of one term shall, as far as may be practicable, be kept in different pigeon-holes or places of deposit from those of any other term.

## RULE XI.

## JURIES.

§ 1. Whenever an issue of fact, which the law requires to be tried by a jury, shall be joined in proceedings in the nature of quo warranto, or in mandamus in the Supreme Court, the Clerk shall, at the instance of either of the parties, make out a venire facias, directed to the Crier of this Court, command-

ing him to summon from the State at large sixteen jurors, having the qualifications of electors, to appear before the Court at the day named therein, which day shall be determined by the Court before the issuing of the venire. The venire shall be served and returned at least one week before the day named therein for the appearance of the jurors; and the Crier shall attach to, or incorporate in his return, a list of the names of the jurors summoned.

§ 2. Challenges for cause to array, and peremptory challenges, may be made by either party, as is now provided by law in other cases, and the validity of such challenges shall be determined by the Court.

If, from challenge or any cause, the panel shall not be full, the Court may order the Crier to fill the same from the bystanders or neighboring citizens having the qualifications of electors.

§ 3. The jurors summoned as above provided, or such of them as are not set aside or challenged, together with so many of the bystanders and neighboring citizens having the qualifications aforesaid, not set aside on challenge, as will make up the number of twelve, or if the whole array be set aside, twelve of such bystanders or neighboring citizens having the qualifications aforesaid, as may not be set aside on challenge, shall constitute a jury for the trial of said issue of fact.

§ 4. Each juror shall be entitled to the same compensation and mileage as are provided by law for jurors, in civil causes, in the Court of Common Pleas.

## RULE XII.

### THE MINUTE BOOK AND ITS CONTENTS.

There shall be kept by the Clerk a book, to be called the Minute Book, in which shall be separately entered every cause and motion hereafter docketed in this Court, except motions in pending causes, which motions shall be noted in their proper causes, but shall not be separately entered in said book, and also the date of docketing the same, and the payment of fees and by whom paid.

He shall also briefly note therein the issuing and date of all process sued out of this Court, the return day thereof, when returned, whether served or not, and the date of service, if made; also, under the proper dates, the filing of all pleadings, depositions, briefs, or other papers that may be filed in the cause, in this Court; and briefly note all motions in the cause that may be placed on the Motion Docket; and all orders and judgments of this Court in the cause, with a reference to the journal and page where the same may be entered, and to the volume and page of the complete record thereof, if there be one.

He shall also note therein by whom and when any papers may be taken from his office, and when returned.

### RULE XIII.

#### WITHDRAWAL OF BRIEFS.

After a cause has been decided and reported, counsel may withdraw manuscript briefs from files.

### RULE XIV.

#### WHEN RECORDS ARE TO BE COMPLETED.

In cases decided before the first of May in any term, if complete records therein are to be made in this Court, they shall be completed before the first day of the ensuing October.

### RULE XV.

#### ADMISSION TO THE BAR.

§ 1. Applications for admission to the Bar will be received on the day preceding the examination, and at no other time.

§ 2. At the commencement of each term of the Court there shall be appointed a Committee of ten discreet and judicious attorneys and counselors-at-law, to be known as the Standing Committee on Examinations, whose duty it shall be to examine all applicants for admission to the Bar, any three of whom may conduct an examination.

§ 3. Examinations shall be conducted in open Court, or by two judges thereof, or in the presence of at least three members of said Standing Committee; and each member of the Committee present at an examination shall report, in writing, for or against the admission of the applicant.

§ 4. No applicant shall be admitted to the oath of office unless a majority of the Examiners present shall certify that they find him to have a competent knowledge of the law and to have a sufficient general learning to discharge the duties of an attorney and counselor-at-law, and shall recommend his admission.

§ 5. If the applicant, on examination, shall be rejected, he shall not again be admitted to an examination within six months from the date of such rejection, and shall file a certificate that he or she has studied law for six months subsequent to date of first examination.

§ 6. Except as provided in section 561 of the Revised Statutes, each applicant must produce a certificate of qualification, as required by section 560 of the Revised Statutes, signed by his preceptor; and in no case will the certificate of any other attorney or counselor-at-law be received unless it be shown by the affidavit of the applicant that his preceptor is dead, or that his certificate can not, for some reason satisfactory to the Court, be obtained. And when the certificate of an attorney and counselor-at-law other than the preceptor of the applicant is produced, it must show that the certifier has personal knowledge of the length of time the applicant has been engaged in the study of the law, and the name of his preceptor.

§ 7. The certificate produced in conformity to the foregoing rule, shall not be deemed conclusive evidence of the facts therein stated; but, in all cases, the court must be satisfied of its truth before the applicant will be admitted to an examination.

§ 8. The applicant must sustain a satisfactory examination upon the law of real and personal property, personal rights, contracts, evidence, pleading, partnerships, bailments, negotiable instruments, principal and agent, principal and surety, domestic relations, wills, corporations, equity, juris-

prudence, criminal law, and upon the principles of the Constitution of the State and of the United States, and legal ethics.

§ 9. Examinations shall be conducted by both oral and written or printed interrogatories. The written or printed interrogatories and the answers of the applicant thereto shall be submitted to the Court with the report of the Examiners, and shall, together with the certificate required by § 6 of this rule, be filed and preserved by the Clerk.

§ 10. Each applicant, upon receiving the oath of office, shall sign a roll showing the date of his admission and his place of residence.

§ 11. Each applicant, before examination, shall pay to the Clerk the sum of five dollars; provided, that in case any applicant shall fail to receive a certificate of qualification, he shall not be required to pay any further sum upon a renewal of his application.

§ 12. The Clerk shall enter all sums so received in a cash book, showing date and name of applicant, and shall pay the same out upon the order of the Chief Justice in payment of the expenses of such examinations, and for no other purpose; that is to say, the cost of necessary printing and stationery; to the Clerk, for each certificate of admission issued to an applicant, one dollar; to each member of the Standing Committee, his necessary traveling expenses, and, for personal expenses while actually engaged in such examination, not exceeding five dollars per day.

## RULE XVI.

### PETITIONS IN CRIMINAL CASES.

A motion for leave to file a petition in error in a criminal cause, with the transcripts, containing marginal references, together with the assignments of error, shall be filed with the Clerk at least five days before the same shall stand for hearing, unless, for good cause shown in any case, the Court otherwise order.

## RULE XVII.

### NOTICE OF MOTIONS.

No motion will be permitted to be placed upon the motion docket for hearing, until proof of notice to opposing counsel of the filing and time for hearing such motion is filed with the Clerk.

## RULE XVIII.

### FILING OF MOTIONS.

A motion cannot be filed on the day set for its hearing, except by special leave of the Court.

## RULE XIX.

### BRIEFS ON MOTION FOR LEAVE.

§ 1. A motion for leave to file a petition in error will not be considered, unless counsel for the applicant file with the papers in the case either a printed or plainly written brief, containing a statement of the questions presented, and a short statement of so much of the case as may be necessary to show how the questions arise.

§ 2. Petition in error in civil cases, from the Circuit Court, is filed without leave of Court ; fees \$5.00.





## TABLE OF CASES REPORTED.

	PAGE.		PAGE.
Adm'r of Moore, Moore v.....	89	Gordon v. The State.....	607
Adm'r of Fredericks, Village of		Gray v. Kerr.....	652
Cardington v.....	442	Gunsaulus, Adm'r v. Pettit,	
Agricultural Society, Dunn v.....	93	Adm'r .....	27
Andrews v. Lembeck .....	38	Handy, Seebaum v.....	560
Armstrong v. Bank.....	512	Handy v. Sibley.....	9
Arnold v. Donaldson.....	73	Harpold v. Stobart.....	397
Austin, Huff v.....	386	Henry, Rutter v.....	272
Bailey & Co., Childs, Groff & Co. v.	557	Hiestand & Co., Taylor <i>et al.</i> v....	345
Bank v. Armstrong.....	512	Hill v. Myers .....	183
Bank, Bridge Co. v.....	224	Hills v. Ludwig.....	373
Bank v. Cunningham.....	575	Hoffhines, Railroad v.....	643
Bank, Miller, Treas. v.....	424	Hoffman, Braden v.....	639
Bank, Rouse, Trustee, v.....	493	Huff v. Austin .....	386
Bank v. Portner.....	381	Hurley v. The State .....	320
Board of Education v. Board of		Insurance Co. v. Ratterman,	
Education.....	595	Treas .....	153
Board of Education, Board of		Insurance Co., Scheifers <i>et al.</i> v....	418
Education v.....	595	Iron Co., Railway Co. v.....	44
Board of Infirmary Directors,		Jacobs v. Mitchell.....	601
Trustees of Canaan Tp. v.....	694	Julian v. The State.....	511
Bosworth, Railway Co. v.....	81	Kahn Walton.....	195
Braden v. Hoffman .....	639	Kerr, Gray v.....	652
Bridge Co v. Bank .....	224	Kineon, Cohoon v.....	601
Childs, Groff & Co. v. Bailey & Co.	557	Kinninger, The State v.....	570
Cincinnati, Seansgood v.....	296	Laylin, Lewis v.....	663
Claggett, Village of Shelby v....	549	Lee, Treas. v. Sturges.....	153
Commissioners v. Osborn.....	271	Lembeck, Andrews v.....	38
Cohoon v Kineon.....	590	Lewis v. Laylin.....	663
Corrigan Rolling Mill Co. v.....	283	Lewis, Morgan v.....	1
Corry, Douglas v.....	349	Leyda, O'Dell v.....	244
Cunningham, Bank v.....	575	Levy & Bro., Ensel v.....	255
Davidson, Eaton & Co. v.....	355	Lockoman, Williams <i>et al.</i> v.....	416
Donaldson, Arnold v.....	73	Ludwig, Hills v.....	373
Douglas v. Corry .....	349	Mandel v. McClave <i>et al.</i> .....	407
Dunn v. Agricultural Society.....	93	Mannix v. Purcell.....	102
Eaton & Co. v. Davidson.....	355	Miller v. First National Bank....	424
Emerine, Spence v.....	433	Miller v. Merchant's Nat'l Bank	424
Ensel v. Levy & Bro.....	255	Miller v. Third National Bank...	424
Farr v. Ricker .....	265	Mitchell, Jacobs v.....	601
Finley v. Whitley .....	524	Monnett, Adm'r, Monnett v.....	30
Foraker, Gov'r, State <i>ex rel.</i> v.....	677	Monnett v. Monnett, Adm'r.....	30
Foster, Adm'r v. Wise, Adm'r....	20	Moore v. Adm'r of Moore .....	89
Furnace Co., Nail & Iron Co. v..	544	Morgan v. Lewis .....	1
Garver v. Tisinger.....	56	Myers, Hill v.....	183
Goins v. The State.....	457	Myers v. The State .....	473
		McClave, Mandel v.....	407

	PAGE.		PAGE.
Nail & Iron Co. v. Furnace Co....	544	Seebaum v. Handy .....	560
Neubert v. Phillips.....	559	Senff v. Pyle.....	102
O'Dell, Leyda v.....	244	Seville v. Wagner .....	52
Ohio, Myers v .....	473	Shearer, State <i>ex rel.</i> Attorney- General v.....	275
Ohio, Weil v.....	450	Shields v. Titus .....	528
Ohio, Goins v.....	457	Sibley, Handy v.....	9
Ohio, Hurley v.....	320	Simpson <i>et al.</i> , Sayler <i>et al.</i> v.....	510
Ohio, Julian v.....	511	South <i>et al.</i> , Posegate v.....	391
Ohio, Gordon v.....	607	Spence v. Emerine.....	433
Ohio, Santoro v.....	607	State, Myers v.....	473
Ohio <i>ex rel.</i> Attorney-General v. Shearer <i>et al.</i> .....	275	State, Goins v.....	457
Ohio v. Kinninger.....	570	State, Weil v.....	450
Ohio <i>ex rel.</i> Construction Co. v. Rabbitts .....	178	State, Hurley v.....	320
Ohio <i>ex rel.</i> Ensign v. Root, Aud'r	510	State <i>ex rel.</i> Attorney-General v. Shearer .....	275
Osborn, Commissioners v.....	271	State <i>ex rel.</i> Construction Co. v. Rabbitts .....	178
Paxson, Woolley .....	307	State <i>ex rel.</i> Ensign v. Root, Aud'r	510
Pennsylv'a Co., Young, Treas. v.	558	State <i>ex rel.</i> v. Foraker, Governor	677
Pettit, Adm'r, Gunsaulus v.....	27	State v. Julian.....	511
Phillips, Neubert v.....	559	State v. Kinninger.....	570
Pollock, Pope v.....	367	State, Gordon v.....	607
Pope v. Pollock.....	367	State, Santoro v.....	607
Posegate v. South <i>et al.</i> .....	391	Stobart, Harpold v.....	397
Portner, Bank v.....	381	Sturges, Lee, Treas. v.....	153
Purcell, Mannix v.....	102	Taylor <i>et al.</i> v. Hiestand & Co....	345
Pyle, Senff v.....	102	Tisinger, Garver v.....	56
Rabbitts, State <i>ex rel.</i> Construc- tion Co. v.....	178	Titus, Shields v.....	528
Railroad Co. v. Hoffhines.....	643	Trustees of Canaan Township v. Board of Infirmary Directors..	694
Railroad Co. v. Iron Co.....	44	Village of Shelby, Claggett v.....	549
Railway Co. v. Bosworth.....	81	Village of Cardington v. Adm'r of Fredericks.....	442
Ratterman, Insurance Co. v.....	153	Wagner, Seville v.....	52
Rhodes v. Weldy.....	234	Walton, Kahn v.....	195
Ricker, Farr v.....	265	Weil v. The State .....	450
Rolling Mill Co. v. Corrigan.....	283	Weldy, Rhodes v.....	234
Rouse, Trustee v. Bank .....	493	West v. Weyer.....	66
Root, Aud'r, State <i>ex rel.</i> En- sign v.....	510	Weyer, West v.....	66
Rutter v. Henry.....	272	Whitley, Finley v.....	524
Santoro v. The State.....	607	Williams v. Lockoman.....	416
Savings Bank v. Bridge Co.....	224	Wise, Adm'r, Foster, Adm'r v....	20
Sayler <i>et al.</i> v. Simpson <i>et al.</i> .....	510	Woolley v. Paxson.....	307
Scheifers <i>et al.</i> v. Insurance Co... 418		Young, Treas. v. Pennsylv'a Co... 558	
Seasongood v. Cincinnati.....	296		

# TABLE OF CASES CITED.

	PAGE.		PAGE.
Adams v. Wheeler, 97 Mass. 67...	340	Beatty v. Kurtz, 2 Peters, 566.....	141
Adler v. Whitbeck, 44 Ohio St. 539 .....	638	Beauchamp v. Troft, Keilw. 26.....	369
African M. E. Church v. Conover, 27 N. J. Eq. 159 .....	141	Becker v. Koch, 104 N. Y. 394...	340
Alexander v. Gibson, 2 Campb. 555 .....	142	Beebe v. Scheidt, 13 Ohio St. 406 .....	676
Allen v. Culver, 3 Denio, 284, 293 .....	86	Bell v. New York, 10 Paige 49...	414
Allen v. Merchants' Bank, 22 Wend 215.....	233	Bennett v. Farrell, 1 Campb. 130 .....	521
Alley v. Hutchings, 2 M. & Rob. 358 .....	340	Bigelow v. Randolph, 14 Gray, 541 .....	97
Allison v. Porter, 29 Ohio St. 136 .....	192	Bisher v. Richards, 9 Ohio St. 485 .....	672
Alsdorf v. Reed, 45 Ohio St. 653..	29	Bitz v. Meyer, 11 Vroom, 252.....	369
Anderson v. Rountree, 1 Pinney (Wis.) 115.....	41	Black v. Kuhlman, 30 Ohio St. 196 .....	411
Atlas Bank v. Doyle, 9 R. I. 76...	18	Blain v. Taylor, 10 Abb. Prac. 228 .....	86
Atwood v. Fisk, 101 Mass. 363...	207	Blodgett v. The State, 3 Ind. 403 .....	626
Atwood v. Marger, Style, 378.....	370	Board of Com'rs v. Mighels, 7 Ohio St. 119 .....	97
Aurora v. Hillman, 90 Ill. 61.....	555	Boatman v. Lasley, 23 Ohio St. 614 .....	539
Avery's Lessee v. Baum's Heirs, Wright, 576 .....	380	Bobo v. Vaiden, 20 S. C. 271.....	26
		Bobo v. Richmond, 25 Ohio St. 115 .....	379
Babcock v. Fon Du Lac, 58 Wis. 240 .....	50	Bode, Adm'x v. Welch, 29 Ohio St. 19 .....	182
Baer v. Otto, 34 Ohio St. 11.....	55	Bolton v. Martin, 1 Dallas, 396...	41
Bailey v. The Mayor, 3 Hill, 531 .....	97	Bond v. Railroad Co., 45 Wis. 479 .....	694
Bailey v. Swaine, 45 Ohio St. 657 .....	275	Bowen v. Hoxie, The Reporter, vol. 18, 721.....	239
Bailey v. Stoneman, 41 Ohio St. 333, 339 .....	268	Bowyer v. Bampton, 2 Strange, 1155 .....	384
Bank of Phila. v. St. John, 5 Hill, 497.....	439	Bradley v. Bauder, 36 Ohio St. 28 .....	163
Bank of U. S. v. Daniel, 12 Peters, 32.....	81	Braiden v. Mercer, 44 Ohio St. 339 .....	62
Bank v. Wallbridge, 19 Ohio St. 419 .....	216	Brashear v. West, 7 Pet. 608.....	61
Bank v. Davis, 6 W. & S. 285.....	324	Brig Aurora v. The United States, 7 Cranch, 382.....	634
Bank v. Hinton, 21 Ohio St. 509 .....	414	Brisbane v. Dacres, 5 Taunt. 144 .....	51
Bank v. Slemmons, 34 Ohio St. 142 .....	554	Broadrup v. Woodman, 27 Ohio St. 559 .....	136
Barholt v. Wright, 45 Ohio St. 177 .....	223	Bronson v. Coffin, 108 Mass. 175..	86
Barnard v. Campbell, 58 N. Y. 79 .....	362	Brooks v. Weeks, 121 Mass. 433..	341
Barnes v. The State, 20 Conn. 232 .....	626	Brooks v. Hyde, 37 Cal. 375.....	629
Barto v. Abbe, 16 Ohio, 408 .....	666	Brown v. Ward, 3 Duer (N. Y.) 660 .....	15
Basenhorst v. Wilby, 45 Ohio St. 333, 339 .....	268	Brown v. The State, 23 Kans. 235 .....	26
Basket v. Keitt, 22 S. C. 187.....	340	Brown v. Agricultural Soc., 47 Me. 275 .....	97
Baxter v. Bowyer, 19 Ohio St. 490 .....	395	Brown v. Bellows, 4 Pick. 179.....	324
Beach v. Leahy, Treas., 11 Kans. 23 .....	282	Brown v. Hitchcock, 36 Ohio St. 667 .....	404
Beardsley v. Foote, 14 Ohio St. 416 .....	259	Brown v. The State, 11 Ohio, 277 .....	650

	PAGE.		PAGE.
Bryant v. W. U. T. Co., 22 Am. L. Reg. 613 .....	216	Commonwealth v. Hitchings, 5 Gray, 482 .....	626
Bullard v. Pearsall, 53 N. Y. 230	340	Commonwealth v. Weller, 14 Ky. 218 .....	632
Bullock v. Kilgour, 39 Ohio St. 543 .....	404	Commonwealth v. Hudson, 11 Gray, 64 .....	333
Bump v. Betts, 19 Wend. 421 .....	370	Commissioners v. Ranney, 13 Ohio St. 388 .....	271
Bundy v. Iron Co., 35 Ohio St. 80	151	Commonwealth v. Shields, 62 Mo. 247 .....	282
Burbank v. Pillsbury, 48 N. H. 475 .....	86	Commissioners v. Miller, 7 Kans. 479 .....	629
Burgett v. Burgett, 1 Ohio, 469 ..	600	Commissioners v. Jenkins, 19 Ohio St. 348 .....	676
Burkhalter v. Edwards, 16 Ga. 593 .....	340	Commissioners v. McLain, 2 Ark. 402 .....	352
Burrows v. Vandevier, 3 Ohio, 383 .....	676	Cook v. Burlington, 59 Iowa, 251	162
Burton v. Frey, 139 Mass. 126 ..	568	Cook v. Courtright, 40 Ohio St. 248 .....	347
Butman v. Fowler, 17 Ohio, 101 ..	672	Coombs v. New Bedford Co., 102 Mass. 572 .....	294
Caldwell v. Tutt, 10 Lea (Tenn.) 258 .....	569	Coombs v. Watson, 32 Ohio St. 228 .....	354
Campbell, Adm'r v. Boggs, 48 Pa. St. 524 .....	353	Coombs v. Lane, 4 Ohio St. 112 ..	671
Canal Co. v. Commonwealth, 50 Pa. St. 399 .....	176	Connard v. Connard, 38 Ohio St. 467 .....	72
Carlisle v. Wishart, 11 Ohio, 172	365	Coppin v. Greenlees, 38 Ohio St. 279 .....	6-8
Casoni v. Jerome, 58 N. Y. 321 ..	62	Corn Exchange Ins. Co. v. Babcock, 42 N. Y. 613 .....	192
Castle v. Rickly, 44 Ohio St. 490	269	Corning v. Gould, 16 Wend. 531	549
Catlin v. Eagle Bank, 6 Conn. 233 .....	499	Corwin v. Benham, 2 Ohio St. 37	78
Chamberlain v. Williamson, 2 M. & S. 408 .....	448	Coulter v. Express Co., 56 N. Y. 588 .....	340
Champ v. Commonwealth, 2 Metc. 17 .....	340	Courtright v. Staggers, 15 Ohio St. 511 .....	593
Chapman v. Searl, Adm'r, 3 Pick. 38 .....	264	Cowie v. Alloway, 8 T. R. 257 ..	439
Chase v. Washburn, 1 Ohio St. St. 244-252 .....	247	Cowles v. Raguet, 14 Ohio, 38 .....	229
Cheney v. Selman, 71 Ga. 384 .....	316	Cox v. Eayers, 55 Vt. 24 .....	340
Choat v. Arrington, 116 Mass. 552	26	Crane v. Waggoner, 27 Ind. 52 ..	71
Cincinnati College v. The State, 19 Ohio, 110 .....	159	Creps v. Baird, 3 Ohio, 277 .....	79
Clark v. Dutcher, 9 Cowen, 674-684 .....	50	Cummings v. Kent, 44 Ohio St. 92	267
Clements v. Hull, 35 Ohio St. 141	441	Cunning v. Brown, 9 East. 505 ..	264
Clossen v. Staples, 42 Vt. 209 ..	370	Cushman v. Welsh, 19 Ohio St. 536 .....	439
Cochran v. Loving, 17 Ohio, 409	627	Curran v. The State, 15 How. 312	503
Coddington v. Bay, 20 Johns. 637	365	Dayton v. Hinsey, 23 Ohio St. 258 .....	527
Coffin v. Coffin, 7 Me. 298 .....	353	Delaware Railroad Tax, 18 Wall. 206 .....	159
Cole v. Milmine, 88 Ill. 349 .....	204	Dennis v. Railroad, 34 La. Ann. 954, 958 .....	176
Cole v. Hawkins, Andrews, 275 ..	41	Denton v. Whiting, 31 Ohio St. 89	38
Collins v. Insurance Co., 17 Ohio St. 215 .....	267	Denton v. Embury, 5 Eng. 228 ..	351
Collis v. Emett, 1 H. Blk. 313 ..	521	Dodge v. Nat'l Ex. Bank, 20 Ohio St. 234 .....	518
Comegys v. Vasse, 1 Pet. 213 .....	448	Dodge v. Bank, 30 Ohio St. 1 .....	520
Compton v. Wilder, 40 Ohio St. 130 .....	42	Douglas v. Cincinnati, 29 Ohio St. ....	165
Compton v. Richards, 1 Price, 27	588		
Commonwealth v. Stacey, The Reporter, vol. 14, 667 .....	63		
Commonwealth v. Welsh, 4 Gray, 535 .....	339		

# TABLE OF CASES CITED.

xxi

	PAGE.		PAGE.
Douglas v. Waddell, 1 Ohio, 413.	267	Fortman v. Rottier, 8 Ohio St.	
Douglas v. Scott, 5 Ohio, 195.....	27	548.....	370
Duncan, Sherma. & Co. v. Gilbert, 5 Dutch (N. J. L. R.) 527.	18	Foster v. Claggett, 6 Dowling's Pr. Cas. 524.....	439
Dungan v. Miller, 37 N. J. L. 182.....	41	Franklin Co. v. Savings Bank, 68 Me. 43.....	49
Dunlap v. Robinson, 12 Ohio St. 530.....	79	Frazier v. Williams, 24 Ohio St. 625.....	641
Dunn v. Aslett, 2 M. & Rob. 122.	327	Frazier et al. v. Seiburn et al., 16 Ohio St. 615.....	170
Dye v. Scott, 35 Ohio St. 194.....	268	Freeman v. Cooke, Exch., 662 ...	260
Early v. Friend, 16 Grat. (Va.) 41.....	71	Friedlander v. Royal Ex. Assurance Co. 4 B. & Adol. 193.....	327
Easter v. Railroad Co., 14 Ohio St. 48.....	86	Gadley v. Dyer, 91 N. Y. 312.....	340
Eastern Bank v. Commonwealth, 10 Barr, 443.....	176	Gaylord v. Inshoff, 26 Ohio St. 317	194
Eckland v. Donahue, 9 Daley, 214.....	569	Gentile v. The State, 29 Ind. 409	282
Eichelberger v. Gross, 42 Ohio St. 549.....	25	Gerke v. Purcell, 25 Ohio St. 229	142
Enyart v. Hanover Township, 25 Ohio St. 618.....	693	Gibson v. Minett, 1 H. Blk. 569	521
Espy v. Bank, 18 Wall. 604.....	207	Gibson v. Hunter, 2 H. Blk. 187	521
Estabrook v. Gebhart, 32 Ohio St. 415.....	527	Gillespie v. Palmer, 20 Wis. 544	693
Everett, Weddell & Co. v. Summers, 32 Ohio St. 562.....	377	Glass Co. v. City of Boston, 4 Met. 181.....	51
Et parte Brown, 19 Bevan, 97.....	401	Glave v. Harding, 2 L. J. (N. S.) C. L. R. 292 .....	587
Et parte Ferguson, 6 Cow. 596.....	352	Glenn v. Cuttle, 2 Grant. Cas. 273	351
Exchange Bank v. Hines, 3 Ohio St. 1.....	175	Gordon v. Bucknell, 38 Iowa, 438	651
Farrington v. Tennessee, 95 U. S. 679.....	159	Goslin v. Willock, 2 Wils. 305.....	369
Farvert v. Finfrook, 43 Ohio St. 335.....	676	Goodin v. Canal Co., 18 Ohio St. 182.....	504
Ferraria v. Vasconcellas, 31 Ills. 25.....	137	Goodlittle v. Clayton, 4 Burr. 2224.....	327
Ferris v. Bramble, 5 Ohio St. 109	676	Grant v. Ludlow, 8 Ohio St. 37.....	448
Fidelity Ins. Co's Appeal, 99 Pa. St. 443.....	137	Gregory v. Wendell, 40 Mich. 432	204
Finch v. Board of Education, 30 Ohio St. 37.....	97	Griswold v. Pelton, 34 Ohio St. 482.....	306
Finley v. Phil'a, 32 Pa. St. 381..	176	Greenough v. Eccles, 5 C. B. (N. S.) 786.....	333
First Pres. Soc. v. Longley, 25 Ohio St. 128.....	137	Greer v. Youngs, 17 Ill. App. 106	41
Fisher v. Fisher, 98 Mass. 303...	17	Gross' Estate, 10 Pa. St. 360.....	316
Finney v. Cochran, 1 W. & S. 118.....	351	Grove v. Brien, 8 How. (U. S.) 429.....	252
Fletcher v. Dickinson, 7 Allen, 23.....	15	Groves v. Clark, 21 La. Ann. 567	385
Fleming v. Culbert, 46 Pa. St. 498	351	Guitar v. Gordon, 17 Mo. 408.....	316
Flickinger v. Saum, 40 Ohio St. 591.....	396	Haff v. Fuller, 45 Ohio St. 495...	676
Fontain v. Ravenal, 17 How. 384.....	140	Halsey v. Stewart, 1 Southard, 366.....	41
Forbes v. Espy, 21 Ohio St. 483..	521	Halsey v. Whitney, 4 Mason, 206	61
Forth v. Simpson, 66 Eng. Com. Law, 680.....	568	Hamilton v. Rodgers, 38 Ohio St. 242.....	319
		Hammond v. Barclay, 2 East. 227	567
		Hanoff v. The State, 37 Ohio St. 178.....	554
		Hanson v. Donkersley, 37 Mich. 184.....	405
		Harding v. Trustees, 3 Ohio, 227	666
		Harrison v. Clark, 87 N. Y. 572..	63
		Harrington v. Bigelow, 11 Paige, 349.....	208

	PAGE.		PAGE.
<i>Hatch v. Burroughs</i> , 1 Wood's. 439 .....	385	<i>In re Healy</i> , 53 Vt. 694.....	41
<i>Hawley v. Bradford</i> , 9 Paige, 200 .....	414	<i>In re Porter's Trusts</i> , L. R. 8 Eq. 52 .....	314
<i>Hayes v. Shields</i> , 2 Yeates, 222....	41	<i>Irwin v. Williar</i> , 110 U. S. 499 .....	204, 216
<i>Hayden v. Merrill</i> , 44 Vt. 336.....	71	<i>James v. Dubois</i> , 1 Harrison (N. J.) 293.....	243
<i>Haywood v. Lumber Co.</i> , 64 Wis. 639 .....	504	<i>Janison v. Hoy</i> , 46 Mo. 546.....	316
<i>Hazard v. Robinson</i> , 3 Mason, 279 .....	539	<i>Janes v. Jenkins</i> , 34 Ind. 1.....	588
<i>Hemingway v. Garth</i> , 51 Ala. 530 .....	331	<i>Jenny v. Perkins</i> , 17 Mich. 28....	659
<i>Henderson v. Easen</i> , 17 Ad. & El. (N. S.) 701-718 .....	70	<i>Jenz v. Gugel</i> , 26 Ohio St. 527... 192	
<i>Henshall v. Matthew</i> , 1 Dowling's Pr. Cas 217 .....	439	<i>Johnson v. Leggett</i> , 28 Kans. 591 .....	331
<i>Hettrick v. Wilson</i> , 12 Ohio St. 136 .....	640	<i>Johnston v. Smith</i> , 25 Hun. 171.	63
<i>Hicks v. Person</i> , 19 Ohio, 426.....	526	<i>Joliet Iron &amp; Steel Co. v. Scioto Fire Brick Co.</i> 82 Ill. 548. 15	
<i>Higgins v. McCrea</i> , 116 U. S. 671	204	<i>Jones v. Ohio</i> , 20 Ohio, 34.....	377
<i>Hills v. Exchange Bank</i> , 105 U. S. 319.....	430	<i>Jones v. Florence Mining Co.</i> 66 Wis. 268 .....	293
<i>Holdsworth v. Mayor</i> , 2 M. & Rob. 153 .....	340	<i>Jones v. Davis</i> , 35 Ohio St. 474. 165	
<i>Hollenback v. Stanbery</i> , 38 Ia. 325 .....	352	<i>Jordan v. James</i> , 5 Ohio, 89.....	567
<i>Hollingsworth's Appeal</i> , 51 Pa. St. 518.....	238	<i>Juchter v. Boehm</i> , 67 Ga. 534....	370
<i>Holmes v. Nelson</i> , 1 Phila. 217..	41	<i>Juneau Bank v. McSpedan</i> , 5 Bissell 64.....	41
<i>Holmes v. Buckley</i> , 1 Abr. Eq. 27	86	<i>Kahn v. Walton</i> , 46 Ohio St. 195. 606	
<i>Holman v. Johnson</i> , Cowp. 341..	207	<i>Kane v. Bloodgood</i> , 7 John. Ch. 110.....	351
<i>Hooker v. De Palos</i> , 28 Ohio St. 251.....	209, 221	<i>Kelley v. Greenleaf</i> , 3 Story, 93. 658	
<i>Holzworth v. Koch</i> , 26 Ohio St. 33.....	38	<i>Kelley v. West</i> , 80 N. Y. 139.....	63
<i>Houston v. McKenna</i> , 22 Cal. 550 .....	304	<i>Kellog v. Robinson</i> , 6 Vt. 276....	86
<i>Hoyt v. Macon</i> , 2 Col. 113.....	370	<i>Kent v. State</i> , 42 Ohio St. 426....	472
<i>Huber v. Huber's Adm'r.</i> 10 Ohio, 371.....	29	<i>Kerr v. State</i> , 36 Ohio St. 614....	527
<i>Huddison v. Prizer</i> , 9 Phil'a. 65.	41	<i>Ketcham v. Shaw</i> , 28 Ohio St. 503.....	412
<i>Hudson v. Woolcott</i> , 39 Ohio St. 618.....	268	<i>Kingsbury v. Kirwan</i> , 77 N. Y. 612.....	204
<i>Hullman v. Boncamp</i> , 5 Ohio St. 242 .....	141	<i>Kirtland v. Hotchkiss</i> , 42 Conn. 426 .....	159
<i>Humiston et al. v. Anderson's Adm'r</i> , 15 Ohio, 557.....	666	<i>Kitzmiller v. Van Renselaer</i> , 10 Ohio St. 63.....	413
<i>Hunt v. Rousmanier</i> , 1 Pet. 15.	81	<i>Kline v. Wynne</i> , 10 Ohio St. 228.	527
<i>Huntington v. Finch</i> , 30 Ohio St. 447.....	641	<i>Kling v. Ballentine</i> , 40 Ohio St. 391 .....	411
<i>Huston v. Railroad</i> , 21 Ohio St. 236 .....	86	<i>Kramer v. Stock</i> , 10 Watts, 115.	369
<i>Huston v. Craighead</i> , 23 Ohio St. 198 .....	396	<i>Krause v. Dorrence</i> , 10 Pa. St. 462 .....	352
<i>Hyde v. Ellery</i> , 18 Md. 496.....	363	<i>Lamborn v. County Com'rs</i> , 97 U. S. 181.....	50
<i>Inglebright v. Hammond</i> , 19 Ohio. 337.....	247	<i>Lamkin v. Starkey</i> , 7 Hun. 479..	41
<i>Inhabitants of Livermore v. Inhabitants of Peru</i> , 55 Me. 469.	50	<i>Laplugh v. Lamplugh</i> , 1 Peere Williams, 111 .....	236
		<i>Lane v. Krekle</i> , 22 Ia. 399.....	522
		<i>Lawrence v. Hagerman</i> , 56 Ill. 68.	370
		<i>Lawrence v. McCalmont</i> , 2 How. U. S. 426.....	229
		<i>Ledyard v. Hibbard</i> , 48 Mich. 421.	254
		<i>Levi v. Daniels</i> , 22 Ohio St. 38....	377

# TABLE OF CASES CITED.

xxiii

	PAGE.		PAGE.
Lewis v. Anderson, 20 Ohio St.		McKelvy's Appeal, 72 Pa. St.	409. 659
281.....	364. 509	McKenzie v. Steel, 18 Ohio St.	41. 260
Lickbarrow v. Mason, 6 East. 21.	567	McLeod v. Bank, 42 Miss.	99..... 363
Lima v. Cemetery Assoc'n, 42 Ohio		McMonigal v. Brown, 45 Ohio	
St. 128.....	160	St. 499.....	268
Lima v. McBride, 34 Ohio St.	388. 666	McNamee v. Mink, 49 Md.	122.. 369
Linton v. Laycock, 33 Ohio St.		McQuade v. Rosecrans, 36 Ohio	
128.....	318	St. 442.....	209, 606
Little v. Commonwealth, 48 Pa.		Mead v. Young, 4 T. R.	28..... 520
St. 337.....	63	Mechanic's Loan Ass'n v. O'Con-	
Lock v. Butler, 19 Ohio St.	587.. 558	nor, 29 Ohio St.	651..... 79
Lock's Appeal, 72 Pa. St.	491..... 635	Melhuish v. Collier, 14 Jur.	621.. 340
Losee v. Buchanan et al., 51 N. Y.		Merchant's Banking Co. v. Steel	
476.....	389	Co., L. R. 5 Ch. D.	205..... 264
Lowe v. Walker, Doug.	736..... 384	Merril v. George, 23 How. Pr.	
Lowe v. Joliffe, 1 W. Bla'k.	365.. 327	331.....	41
Lowery v. Dillman, 59 Wis.	197. 204	Miles v. McCullough, 1 Binney,	
Lloyd v. The Mayor, 1 Selden,	369. 97	77.....	41
Lyall v. Goodwin, 4 McLean,	29. 41	Millard v. Hathaway, 27 Cal.	119 143
		Miller v. Teachout, 24 Ohio St.	
Maitland v. Citizens Bank, 40		425.....	142
Md. 540.....	18	Miller v. Bank, 8 Watts,	192..... 229
Mann v. Bishop, 136 Mass.	495.. 204	Minet v. Gibson, 3 T. R.	481.. 521
Marbrough v. Smith, 11 Kan.		Monk v. New Utrecht, 104 U. S.	
554.....	370	552.....	553
Mar. & Cin. Ry. Co. v. Strader &		Moore v. Dimond, 5 R. I.	121.... 316
Co., 29 Ohio St.	448..... 527	Moore v. Weaver, 16 Gray,	305.. 316
Marshall v. Wellwood, 38 N. J.		Morgan v. Kinney, 38 Ohio St.	
L. 339.....	389	610.....	135
Marsden v. Soper, 11 Ohio St.		Morgan v. Mason, 20 Ohio St.	
503.....	440	401.....	540
Martin v. Cole, 104 U. S.	37..... 266	Morgan v. Nolte, 37 Ohio St.	23.. 453
Mason v. Alexander, 44 Ohio St.		Morgan v. Boyd, 13 Ohio St.	271 527
318.....	404	Morice v. Bishop of Durham, 9	
Masury v. Southworth, 9 Ohio		Ves. 400.....	139
St. 340.....	86	Morris v. Morris, 9 Heisk. (Tenn.)	
Mathews v. Tufts, 87 N. Y.	568.. 41	814.....	26
Mathews v. Leamon, 24 Ohio St.		Morris C. & B. Co. v. Lewis, 12	
615.....	136	N. J. Eq.	323..... 15
Maxon v. Scott, 55. N. Y.	247.... 191	Morris v. Faurot, 21 Ohio St.	155 267
Mayer v. Walter, 64 Pa. St.	283. 369	Mugler v. Kansas, 123 U. S.	623.. 636
McCafferty v. Conover, 7 Ohio		Muldoon v. Rickey, 103 Pa. St.	
St. 105.....	259	110.....	369
McCardle v. McGinley, 86 Ind.		Munson v. Porter, 63 Ia.	453.... 569
538.....	370	Musser's Ex'r v. Chase, 29 Ohio	
McClelland v. Miller, 28 Ohio		St. 577.....	527
St. 488.....	666		
McDaniel v. State, 53 Ga.	258.... 333	National Bank v. Common-	
McDowell v. Potter, 8 Barr.	189. 353	wealth, 9 Wall.	353..... 431
McFarland v. Wheeler, 26 Wend.		Neil v. Trustees, 31 Ohio St.	15.. 38
473.....	567	Neilson v. Hofford, 8 M. & M.	
McGill v. The State, 34 Ohio St.		806, 823.....	37
228.....	277	Nelson v. Wellington, 5 Bosw.	
McGinnis v. Watson, 41 Pa. St.	9. 137	178.....	15
McGovern v. Knox, 21 Ohio St.		Neville v. Wilkinson, 1 Bro. Ch.	
552.....	143	R. 547.....	213
McIntire v. City of Zanesville,		Newark Coal Co. v. Upson, 40	
17 Ohio St.	352..... 142	Ohio St. 17.....	370
McKee v. Judd, 12 N. Y.	622.... 448	Nichols v. White, 85 N. Y.	531.. 340
McKee v. Nelson, 4 Cowan,	356. 552	Noland v. Clark, 10 B. Mon.	239 229

	PAGE.		PAGE.
Ogden v. Saunders, 12 Wheat.		Queen v. State, 5 Har. & John.	
213 .....	452	232 .....	340
Ohio v. Covington, 29 Ohio St.			
102 .....	277	Ragan v. McCoy, 29 Mo. 367.....	71
Ort v. Fowler, 31 Kans. 478 .....	522	Raguet v. Roll, 7 Ohio, Pt. 1, 77.	
Osborn v. Hawley, 19 Ohio, 130..	439	Pt. 2, 70.....	209
Oshe v. State, 37 Ohio St. 494.....	451	Railroad Co. v. Stout, 17 Wall.	
Overseers v. Sears, 22 Pick, 122..	85	637 .....	289
		Railroad Co. v. State, 41 Md. 268.	340
Padgett v. Lawrence, 10 Paige,		Railroad Co. v. Mowery, 36 Ohio	
180 .....	364	St. 418.....	391
Palmer v. State, 42 Ohio St. 596..	183	Railroad Co. v. Commissioners, 1	
Pangburn v. Bull, 1 Wend. 345..	370	Ohio St. 77.....	632
Papinsau v. Wontworth, 136		Railway Co. v. Railway Co., 31	
Mass. 543 .....	568	N. J. Eq. 475.....	49
Parker v. Steamboat Co., 109		Railway Co. v. Collins, 48 Ga.	
Mass 449 .....	552	582 .....	49
Parker v. Nightingale, 6 Allan,		Railway Co. v. Hinsdale, 45 Ohio	
341 .....	542	St. 556.....	49
Parker v. Langley, Gilbert's Cas.		Railway Co. v. Supervisors, 93	
163 .....	363	U. S. 595.....	159
Parker v. Hotchkiss, 1 Wall. Jr.		Railway Co. v. Dennis, 116 U. S.	
269 .....	41	665 .....	159
Parker v. Commonwealth, 6 Pa.		Railway Co. v. Guffey, 120 U. S.	
St. 507 .....	635	569 .....	159
Payne v. Donegan, 9 Bradw. 566	370	Railway Co. v. City of Sauc, 60	
Peck v. Weddell, 17 Ohio St. 271	633	Me. 196.....	160
Pence v. Arbuckle, 22 Minn. 417	264	Railway Co. v. Maine, 96 U. S.	
People v. Railroad, 43 Cal. 398..	282	499 .....	176
People v. Safford, 5 Denio, 112...	333	Railway Co. v. Probst, 30 Ohio	
People v. Jacobs, 49 Cal. 384 .....	339	St. 104.....	377
People v. Adams, 17 Wend. 475..	626	Railway v. Moore, 33 Ohio St.	
People v. Commissioners, 4 Wall.		384 .....	650
244 .....	162	Rairden v. Holden, 15 Ohio St.	
Perkins v. Boardman, 14 Gray,		207 .....	181
481 .....	568	Ramsey's Appeal, 88 Pa. St. 60..	137
Person v. Grier, 66 N. Y. 124.....	41	Ratcliff v. Warner, 32 Ohio St.	
Phil'a & Reading Ry. v. Derby,		334 .....	397
14 How. (U. S.) 486 .....	390	Rathburn v. Ingalls, 7 Wend. 570	363
Phil'a Bap. Assoc'n v. Smith, 3		Rawden v. Shadwell, 1 Ambler,	
Peters, 500 .....	141	268 .....	211, 218
Phillips v. Im Thurm, 114 Eng.		Ray v. Law, 1 Pet. C. C. 207.....	369
C. L. 694 .....	522	Raymond v. Cleveland, 42 Ohio	
Pickard v. Sears, 6 Ad. & El. 474	260	St. 529 .....	242, 306
Pickaway Bank v. Prather, 12		Reed v. State, 16 Ark. 499.....	626
Ohio St. 497 .....	385	Reeves v. State Bank, 8 Ohio St.	
Pierce v. McClellan, 93 Ill. 245..	659	465 .....	232
Pim v. Nicholson, 6 Ohio St. 176	451	Reeves v. Plough, 41 Ind. 104..	229
Pinkstaff v. The People, 59 Ill.		Reg. v. Williams, 6 Cox C. C. 343.	333
148 .....	26	Regina v. Ball, 8 Car. & P. 745..	338
Pitte v. Shipley, 46 Cal. 160.....	243	Reg. v. Campbell, 1 Car. & K. 82.	626
Pollock v. Pollock, 71 N. Y. 137	340	Reg. v. Stroud, 2 Moody, 270.....	626
Pomeroy v. Benton, 57 Mo. 531..	657	Rex v. Oldroyd, Russ. & Ry. 83..	324
Portarlington v. Souby, 3 M. &		Rex v. Benfield, 2 Bur. 980.....	626
R. 104 .....	218	Rex v. Jenour, 7 Mod. 400.....	627
Porter v. Wagner, 36 Ohio St. 471	648	Reynolds v. Schweinefus, 27 Ohio	
Potts v. Imlay, 1 South. 330.....	369	St. 311.....	671
Powers v. Railway Co., 33 Ohio		Rice v. Foster, 4 Harr. 479.....	634
St. 429 .....	377	Rice v. Insurance, Co., 4 Pick.	
Prior v. Talbott, 10 Cush. 1.....	27	439 .....	330



## TABLE OF CASES CITED.

xxv

	PAGE.		PAGE.
Richey v. Johnson, 30 Ohio St. 288.....	319	Smith v. Parsons, 1 Ohio, 236....	452
Riddle v. Locks and Canals, 7 Mass. 169.....	97	Smith v. Marden, 60 N. H. 509..	569
Roberts v. Thompson, 14 Ohio St. 1.....	229	Smith v. Judge of Twelfth Dist., 17 Cal. 554.....	628
Roberts v. Tucker, 16 Q. B. 560..	520	Smith v. Janesville, 26 Wis. 291.	634
Robinson v. Kanawha Bank, 44 Ohio St. 441.....	267	Society for Prop. Gospel v. Wheeler, 2 Gallison, 105.....	303
Rogers v. Ware, 2 Neb. 29.....	522	Sowers v. Syrenius, 39 Ohio St. 29.	142
Roll v. Raguet, 4 Ohio, 400..209,	220, 606	Spangler v. Cleveland, 35 Ohio St. 469.....	305
Rooney v. Inhabitants of Randolph, 128 Mass. 580.....	553	Spencer v. Campbell, 9 W. & S. 32.	388
Root v. French, 13 Wend. 570...	363	Stafford v. Richardson, 15 Wend. 305.....	352
Roundtree v. Smith, 108 U. S. 269.....	205	Stalker v. McDonald, 6 Hill, 93..	365
Roxborough v. Messick, 6 Ohio St. 448.....	365	Staples v. Staples, 4 Greenl. 532..	352
Ruffner v. Commissioners, 1 Disney, 196.....	282	Stanley v. Stanley, 26 Me. 191...	401
Russell v. Allen, 107 U. S. 163....	140	State v. Building Assoc'n. 35 Ohio St. 263.....	8
Ryerson v. Abbingdon, 102 Mass. 526.....	341	State v. Worthington, 7 Ohio, pt. 1, p. 171.....	35
Saltonstall v. Sanders, 11 Allen, 456.....	140	State v. Powers, 38 Ohio St. 54..97,	279
Sanders v. Keber, 28 Ohio St. 680.	454	State v. Court of Madrid, 51 Mo. 83.....	282
Sanger v. Upton, 91 U. S. 56.....	503	State v. Railroad Co. 66 Me. 488.	176
Sargent v. Sturm, 23 Cal. 361.....	363	State v. The Judges, 21 Ohio St. 1.	277
Sargent v. Parsons, 12 Mass. 149.	71	State v. Hitchcock, 1 Kan. 178...	282
Savil v. Roberts, 1 Salk, 14.....	369	State v. Tucker, 46 Ind. 355.....	282
Savings Inst. v. Linder, 74 Pa. St. 371.....	50	State v. Court of Boon Co. 50 Mo. 317.....	282
Sawyer v. State ex rel. Horr, 45 Ohio St. 343.....	601	State v. Morris, 1 Hayw. 437.....	324
Schaffer v. Marianthall, 17 Ohio St. 183.....	559	State v. Knight, 43 Me. 11, 134...	332
Schryver v. Hawks, 22 Ohio St. 308.....	377	State v. Covington, 29 Ohio St. 102.....	451
Scofield v. Churchill, 72 N. Y. 565.	26	State v. Culver, 27 Am. Rep. 295.	548
Seaver v. Robinson, 3 Duer, 622.	41	State v. Wright, 7 Ohio St. 333...	574
Seegar v. Harrison, 25 Ohio St. 14.	542	State v. Anderson, 3 Rich. 172....	626
Seitz v. Railway Co. 16 Kan. 131.	150	State v. Parker, 26 Vt. 357.....	633
Shields v. Ohio, 95 U. S. 324.....	169	State v. Frame, 39 Ohio St. 399..	638
Shiels v. Stark, 14 Geo. 429.....	71	State ex rel. Lott v. Brewer, 64 Ala. 287.....	176
Shinkle v. The Bank, 22 Ohio St. 516.....	150	State ex rel. Herron v. Smith, 44 Ohio St. 348.....	179
Shinn v. Lafferty, 38 Ohio St. 46..	695	State v. Smith, 69 Ind. 505.....	693
Sheperd v. Commissioners, 8 Ohio St. 354.....	272	State ex rel. v. Rabbitts, ante 178..	695
Skipwith v. Strothers, 3 Rand. 216.....	211, 219	State ex rel. v. Commissioners, 6 Neb. 474.....	693
Slagel v. Entrekin, 44 Ohio St. 637.....	25, 65	State ex rel. v. Babcock, 17 Neb. 188.....	693
Slater v. Cove, 3 Ohio St. 80.....	600	State ex rel. v. Brown, 11 Ill. 478..	693
Small v. Sproat, 3 Metc. 303.....	61	State ex rel. v. Wheaton, 48 Ill. 263.....	693
Smith v. Smith, 56 How. Pr. 316.	370	Steamboat v. Logan, 18 Ohio 396.	552
Smith v. Railway Co. 23 Ohio St. 10.....	377	Stearns v. Bank, 53 Pa. St. 490...	332
		Stettaur v. Carney, 20 Kans. 496.	150
		Stewart v. State, 19 Ohio, 302....	552
		Stonard v. Dunkin, 2 Camp. 344.	264
		Stradling v. Morgan, Plowden, 204.....	599
		Straus v. Eagle Ins. Co. 5 Ohio St. 59.....	49

	PAGE.		PAGE.
Sturges v. Carter, Treas., 114 U. S. 511.....	164	Vanduzer v. Linderman, 10 Johns. 106.....	370
Sullivan v. India M'fg. Co. 113 Mass. 396.....	293	Vattier v. Lytle's Ex'rs, 6 Ohio, 477.....	78
Supervisors v. Stanley, 105 U. S. 305.....	430	Veach v. Elliott, 1 Ohio St. 139..	210
Sweet v. Pym, 1 East, 4.....	557	Vere v. Lewis, 3 T. R. 182.....	521
Swift v. Tyson, 16 Pet. 20.....	366	Vicksburg Ry. Co. v. Dennis, 116 U. S. 665.....	176
Taft v. Wildman, 15 Ohio, 123... 377		Voss v. Bachop, 5 Kan. 59.....	350
Talmadge v. Bank, 26 N. Y. 105. 542		Wagoner v. Loomis, 37 Ohio St. 571.....	175
Tatlock v. Harris, 3 T. R. 181... 520		Walker v. Lessee of Devlin, 2 Ohio St. 593.....	380
Taylor v. Bates, 5 Cow. 376..... 352		Walker v. C., R. I. & P. Ry. Co., 71 Iowa, 658.....	389
Taylor v. Wilson, Cox, 362..... 369		Wallace v. McConnell, 13 Pet. 136.....	232
Taylor v. Beck, 3 Rand. 316..... 385		Wallratt v. Maynard, 3 Barb. 584.....	352
Taylor v. Miami Exporting Co., 5 Ohio, 165.....	504	Ward v. Smith, 7 Wall. 447.....	232
Taylor v. Fitch, 12 Ohio St. 169.. 641		Ward v. Ward, 7 Exch. 838.....	549
The Lochlibo, 1 Eng. L. & Eq. 655.....	333	Watson v. Spratly, 10 Exch. 236	164
Thomas v. Cronise, 16 Ohio, 54.....	209, 221	Watson v. Paine, 25 Ohio St. 340	440
Thomas v. Rouse, 2 Brew. 75..... 369		Waterman v. Hawkins, 63 Me. 156.....	238
Thompson v. Bostwick, 1 McMul. Eq. (S. C.) 75.....	71	Weakly v. Watkins, 7 Humph. 356.....	208, 222
Thompson v. Blanchard, 4 N. Y. 303.....	340	Weaver v. Barden, 49 N. Y. 286	362
Thomson v. Miner, 30 Iowa. 386. 588		Webb v. State, 29 Ohio St. 351... 378	
Titus v. Kyle, 10 Ohio St. 441... 267		Webb v. Spicer, 66 Eng. Com. Law, 894-898.....	606
Titus v. Lewis, 33 Ohio St. 304... 671		Weed v. Bond, 21 Ga. 195.....	385
Todd v. Lee, 16 Wis. 480.....	191	Weisenberg v. Appleton, 26 Wis. 56.....	555
Tomlinson v. Warren, 9 Ohio, 104.....	370	Wells v. McLaughlin, 17 Ohio, 99	672
Tone v. Columbus, 39 Ohio St. 281. 675		Westfall v. Dungan, 14 Ohio St. 276.....	79
Tracy v. Card's Adm's., 2 Ohio St. 442.....	24	Western v. McDermott, L. R. 2 Ch. App. 72.....	542
Trustees v. Odlin, 8 Ohio St. 293, 297.....	48	Wetmore v. Mellinger, 64 Iowa, 751.....	369
Trustees v. Lynch, 70 N. Y. 440.. 85		Wethrill v. Seitzinger, 1 Miles, 237.....	41
Trustees v. Zanesville Canal Co., 9 Ohio, 287.....	142	Wheeler v. Newbould, 16 N. Y. 392.....	15
Tucker v. Ferguson, 22 Wall. 527	159	Wheeler v. Faurot, 37 Ohio St. 26	404
Tuigg v. Tracy, 104 Pa. St. 493.. 147		Whipple v. Fuller, 11 Conn. 582	370
Tulk v. Moxhay, 2 Phillips' Ch. R. 774.....	542	Whitbeck, Treas. v. Mer. Nat'l. Bank, 127 U. S. 193.....	430
Umstead v. Buskirk, 17 Ohio St. 113.....	404	White v. Denman, 1 Ohio St. 110	38
Unger v. Leiter, 32 Ohio St. 210.. 411		Whitelaw v. Railroad Co., 16 Tenn. 391.....	293
United States v. Kirkpatrick, 9 Wheat. 735.....	176	Whitney v. Union Ry. Co., 11 Gray, 364.....	87
Union Bank v. State, 9 Yeager, 490.....	162	Whitney v. Webb, 10 Ohio, 513.. 600	
Upton, Assignee, v. Tribilcock, 91 U. S. 45.....	504	Wilcox v. Executors of Plummer, 4 Pet. 172.....	353
Urmy v. Wooden <i>et al.</i> , 1 Ohio St. 160.....	140	Wildermuth v. Koenig, 41 Ohio St. 180.....	19
Vagliano Bros. v. Bank of England, 23 Q. B. D. 243.....	524		

## TABLE OF CASES CITED.

xxvii

	PAGE.		PAGE.
Williams v. First Pres. Soc. Cin., 1 Ohio St. 478 .....	143	Worthington v. Sebastian, 25 Ohio St. 1.....	160
Williams v. Englebrecht, 37 Ohio Ohio St. 383.....	208	Wright v. Becket, 1 M. & Rob. 414 .....	324
Williams Exparte, 11 Vesey, Jun. 5.....	659	Wright v. McCormick, 17 Ohio St. 86.....	404
Williard's Estate, 68 Pa. St. 327	236	Wroe v. The State, 20 Ohio St. 400	554
Winter v. Butt, 2 M. & Rob. 357.	340	Wynne v. Callendar, 1 Russ. & Ry. 23.....	218
Wood v. Carpenter, 101 U.S. 135.	354		
Wood v. Dummer, 3 Mason, 311..	503	Yahn v. Ottumwa, 22 Am. Law Reg. 644.....	552
Woodmansie v. Logan, 1 Penn. (N. J.) 68.....	369	Yeates v. Gill, 9 B. Mon. 203.....	316
Woodroffe v. Farnham, 2 Vern. 291 .....	218	Young v. Robinson, 11 Gill & J. 328 .....	316
Woods v. Finnell, 13 Ky. 628.....	370	Young v. Kimball, 23 Pa. St. 195.	569
Woodson v. Barrett, 2 Hen. & Munf. 88 .....	211, 219		
Woolever v. Knapp, 18 Barb. 265.	71	Zimpleman v. Veeder, 98 Ill. 613.	15



# TABLE OF STATUTES CONSTRUED, EXAMINED, CITED, ETC.

## REVISED STATUTES.

- Act of January 3, 1825. Religious societies. *Mannix v. Purcell et al.*, 148.  
 Act of February 28, 1846. Agricultural Societies. *Dunn v. Agricultural Society*, 97.  
 Act of March 21, 1851. Railroads. *Railroad Co. v. Hoffhines*, 651.  
 Act of May 2, 1852. Corporations. *Railroad Co. v. Hoffhines*, 646.  
 Act of March 25, 1859. Railroads. *Railroad Co. v. Hoffhines*, 649.  
 Act of April 5, 1859. Taxation. *Lee, Treas. v. Sturgis*, 158.  
 Act of March 13, 1868. Judicial subdivisions. *State v. Kinninger*, 570.  
 Act of February 11, 1869. Bill of exceptions. *Seville v. Wagner*, 55.  
 Act of May 4, 1869. Rate of interest. *Taylor v. Hiestand*, 347.  
 Act of May 7, 1869. Sec. 199. Intoxicating liquors. *Gordon v. The State*, 628.  
 Act of March 30, 1875. Appeals. *State ex rel. Construction Co. v. Rabbitts*, 182.  
 Act of May 11, 1878. Taxation. *Lee, Treas. v. Sturgis*, 166.  
 Act of March 27, 1884. Street assessments. *Cincinnati v. Seasingood*, 300.  
 Act of April 25, 1885. Same. Same, 299.  
 Act of May 4, 1885. "Margins." *Kahn v. Walton*, 210.  
 Act of May 4, 1885. Conditional sales. *Weil v. State*, 450.  
 Act of March 11, 1887. Street assessments. *Cincinnati v. Seasingood*, 301.  
 Act of March 19, 1887. Removal of actions. *State ex rel. Construction Co. v. Rabbitts*, 178.  
 Act of March 21, 1887. Judicial subdivisions. *The State v. Kinninger*, 570.  
 Act of March 3, 1888. Local option. *Gordon v. The State*, 607.  
 Act of April 14, 1888. Special school districts. *State ex rel. Shearer*, 276.  
 Act of March 28, 1889. Limitations. Trustees, etc. *v. Board of Infirmary Directors*, 695.  
 Section 79. Repeals and admendments. *State ex rel. Construction Co. v. Rabbitts*, 180.  
 Section 79. Same. *Cincinnati v. Seasingood*, 306.  
 Section 590. Removal of actions. *State ex rel. Construction Co. v. Rabbitts*, 180.  
 Section 1230. Fees and costs. *State ex rel. Ensign v. Root, Aud'r*, 510.  
 Section 1539. Pending proceedings. *Cincinnati v. Seasingood*, 307.  
 Section 2264. Assessments. *Cincinnati v. Seasingood*, 302.  
 Section 2286 Assessments. *Cincinnati v. Seasingood*, 302.  
 Section 2640 Streets. *Lewis et al. v. Laylin et al.*, 675.  
 Sections 2652-2655 Highways. *Nail & Iron Co. v. Insurance Co.*, 549.  
 Section 2730. Taxation. *Lee, Treas. v. Sturgis*, 158.

- Sections 2764-2765. Taxation. *Miller, Treas. v. Bank et al.*, 429.  
 Section 2769. Taxation. *Miller, Treas. v. Bank et al.*, 432.  
 Sections 2770 to 2776, inclusive. Taxation of Railroads. *Lee, Treas. v. Sturgis*, 166.  
 Section 2782. Taxation. *Miller, Treas. v. Bank et al.*, 432.  
 Section 2810. Taxation. Same case, 430.  
 Section 2839. Taxation. Same case, 430.  
 Section 2840. Taxation. Same case, 431.  
 Section 2855. Taxation—Auditor. *Lee, Treas. v. Sturgis*, 177.  
 Section 2859. Taxation—Penalty. *Miller, Treas. v. Bank et al.*, 432.  
 Section 3171. Negotiable instruments. *Spence v. Emerine*, 439.  
 Sections 3212-3213. Lien. *Seebaum v. Handy*, 566.  
 Section 3255. Stocks. *Lee, Treas. v. Ratterman*, 161.  
 Section 3259. Stockholders. *Harpold v. Stobart*, 401.  
 Section 3266. Corporations. *Railway Co v. The Iron Co.*, 50.  
 Section 3324. Railroads—Fencing. *Railway v. Bosworth*, 87.  
 Section 3324. Railroads—Fencing. *Railroad v. Hoffhines*, 648.  
 Section 3329. Railroads—Fencing. *Railway v. Bosworth*, 87.  
 Section 3890. Schools. *State ex rel. v. Shearer*, 278.  
 Section 3972. School property. *Board of Ed. v. Board of Ed.*, 597.  
 Sections 4202-4207-4208. Animals. *Rutter v. Henry*, 274.  
 Section 4269-4270. Gaming or wagering contracts. *Kahn v. Walton*, 222;  
*Bank v. Portner*, 383.  
 Section 4452. Ditches. *Williams v. Lockoman*, 417.  
 Section 4463. Same. Same case, 417.  
 Section 4467. Same. Same case, 417.  
 Sections 4661-4683. Highways. *Nail & Iron Co. v. Furnace Co.*, 549.  
 Section 4829. Highways. *Lewis et al. v. Laylin et al.*, 672.  
 Section 4831. Same. Same case, 673.  
 Section 4842. Assessments. Same case, 669.  
 Section 4850. Highways. Same case, 673.  
 Section 4974. Continuing trust. *Gray v. Kerr*, 657.  
 Section 4974. Limitations. *Douglas v. Corry*, 351.  
 Section 4985. Limitations. *Gray v. Kerr*, 662.  
 Section 4996. Married women. *Hill v. Myers et al.*, 192.  
 Sections 5022-5031 inclusive. Summons—Service. *Andrews v. Lembeck*, 38.  
 Section 5130. Jury trial. *Gunsaulus v. Pettit*, 27.  
 Section 5141. Costs. *Cohoon v. Kineon*, 592.  
 Section 5144. Abatement of Action. *Cardington v. Adm'r of Fredericks*, 449.  
 Section 5167. Juries. *Julian v. The State*, 511.  
 Section 5171. Grand Jury. *Julian v. The State*, 511.  
 Section 5226. Appeal. *Gunsaulus v. Pettit*, 27.  
 Section 5297. Bells of Exceptions. *Finley v. Whitley*, 526.  
 Section 5302. Same. Same case, 526.  
 Section 5319. Married women. *Hill v. Myers et al.*, 192.  
 Section 5354. Vacating Judgment. *Braden v. Hoffman*, 641.  
 Section 5357. Same. Same case, 641.

- Section 5359. Same. Same case, 641.  
Section 5360. Same entry, 641.  
Section 5438. Execution. *Hill v. Myers et al.*, 191.  
Sections 5457-5459, inclusive. Summons—Service. *Andrews v. Lembeck*, 38.  
Section 5535. Attachments. *Bailey Co. v. Childs, Groff & Co.*, 558.  
Section 5639-5640. Contempt of court *Myers v. The State*, 490.  
Section 5645. Same. Same case, 490.  
Section 5774. Rents and profits. *West v. Meyer*, 70.  
Section 5826. Replevin *Weil v. The State*, 455.  
Section 5959. Wills *Rhodes v. Weldy*, 234  
Section 5971 Wills *Woolley et al v. Paxson et al.*, 313.  
Section 5971 Wills *Posegate v. South*, 395  
Section 6020. Administrators—Sureties. *Foster v. Wise*, 20.  
Section 6040. Allowance to Widow. *Moore v. Adm'r of Moore*, 91  
Section 6043. Allowance—Review. Same case, 92.  
Section 6356. Assignments. *Garver v. Tisinger*, 61.  
Section 6407. Appeal. Same case, 62.  
Section 6524. Bills of exceptions *Seville v. Wagner*, 55.  
Section 6581. Offer to allow judgment *Cohoon v. Kineon*, 592.  
Section 6587. Practice. *Cohoon v. Kineon* 593.  
Section 6707. Vacating judgment. *Braden v. Hoffman*, 640.  
Section 6710. Finding of facts. *Senff v. Pyle*, 102.  
Section 6710. Same. *Finley v. Whitley*, 527.  
Section 6710. Same. *Young v. Penn. Co.*, 558.  
Section 6710. Same. *Braden v. Hoffman*, 640.  
Section 6723. Limitations. Trustees, etc. v. Board of Infirmary Directors  
695  
Section 6804. Aiders and abettors. *Goins v. State*, 462.  
Section 7196. Attorneys. *Comm'rs v. Osborn et al.*, 271  
Section 7267. Juries. *Goins v. State*, 460.  
Section 6272. Challenge of jurors. *Goins v. State*, 460.  
Sections 7277-7278 Same. Same case, 461.





# CASES

## ARGUED AND DETERMINED

### IN THE

# SUPREME COURT OF OHIO.

## JANUARY TERM, 1888.

---

HON. SELWYN N. OWEN, CHIEF JUSTICE.  
 HON. FRANKLIN J. DICKMAN,  
 HON. THAD. A. MINSHALL,  
 HON. WILLIAM T. SPEAR,  
 HON. MARSHALL J. WILLIAMS. } *Judges.*

---

46s	1
47	186
46s	1
49	440
49	666
46	1
55	647

**MORGAN v. LEWIS.**

*Corporations—Stockholders—Liability of—In what cases judgment not necessary—  
 Transfer of stock—Evidence—Admissibility.*

1. In an action by creditors to enforce the statutory liability of stockholders for debts contracted by a corporation, where it is alleged that the company is insolvent; that it has entirely ceased to do business; and that it has made an assignment for the benefit of creditors, having neither money, credit nor materials with which to transact business, it is not necessary further to allege that the plaintiff had recovered a judgment against the corporation upon which an execution had been returned unsatisfied.
2. Upon the trial of the action, one of the defendants, an alleged stockholder, offered to prove that he originally became a stockholder by receiving from the corporation its stock in exchange for his interest in a furnace of which he was principal owner; that thereafter, the furnace not proving as successful and profitable as had been expected, some of the stockholders were dissatisfied with the purchase, and contentions arose among them; that defendant was blamed by many of them for having induced the company to make the purchase and was requested to take the furnace back and transfer to the company

---

Morgan v. Lewis.

---

the stock he had received for it; that to settle such contention and dissatisfaction he complied with this request, transferred his stock to the company and accepted therefor a deed for the furnace. *Held*: The evidence was admissible.

(Decided June 26, 1888.)

RESERVED from the District Court of Stark County.

The action below was commenced by Lewis, one of the defendants in error, against the Alliance Rolling Mill Company and other defendants alleged to be stockholders in, or creditors of, the company, for the purpose of enforcing the statutory liability of the stockholders to contribute to the payment of the debts of the corporation, which was alleged to be insolvent, and to have assigned its property and ceased to do business.

The case was referred; there was a trial before the referee, and Morgan, the plaintiff in error, was held as a stockholder. He excepted, and had a bill of exceptions signed by the referee. On hearing, the court of common pleas affirmed the referee's report, Morgan excepting. He then presented a petition in error in the district court where the case was reserved for decision in this court.

In Morgan's answer he says:

"That many years ago, to-wit: About the year 1870, he owned about two-hundred shares of stock in said company and no more. That soon thereafter, to-wit: On or about January 1st, 1871, he sold and disposed of all his stock in said company and ceased to be a stockholder therein. \* \* \* He denies that the indebtedness described in the petition, or any portion thereof, was contracted while he was a stockholder in said company, and he denies that any indebtedness held by the defendants who claim to be creditors of said company, or by any other person making claims in this action to be a creditor or creditors of said company, was contracted during the time that he was a stockholder in said company, or until many years after he had ceased to be such stockholder. He alleges the fact to be that all debts existing against said company, during the whole time that he was a stockholder therein, have long since been fully paid." \* \* \* \* Issue was joined with these averments.

Upon the trial before the referee, Morgan offered to prove that prior to the time the Alliance Rolling Mill Company acquired title to the furnace property, the property was principally owned by the defendant, Morgan, and that for his interest in the furnace property the Alliance Rolling Mill Company issued to the defendant, Morgan, stock in the Rolling Mill Company, which stock was the same stock which was afterwards transferred by the defendant, Morgan, to the Alliance Rolling Mill Company in consideration of the re-transfer to him of the furnace property. And further offered to prove, that after the Alliance Rolling Mill Company acquired title to the furnace property, the furnace not proving as successful and profitable as had been expected, some of the stockholders were dissatisfied with the purchase from Morgan, and contentions arose among them, and the defendant, Morgan, was blamed by many of them for having gotten the company into the purchase and was requested to take the property off their hands and pay for it in stock of the company; and that Morgan, for the sake of settling such contentions and dissatisfaction, did purchase the furnace and pay for it in stock which had been issued to him as shown by the record. And thereupon the referee sustained the objection to the evidence so offered, and defendant, Morgan, excepted.

It was testified to before the referee, and not contradicted, that Morgan transferred his stock to the company and the latter deeded to him the furnace property, of which he took immediate possession, and which he continued to hold and use as his own.

No action has been taken looking to the subjection of this furnace property to the payment of the claims of any creditors, but all parties have treated it as if it were the property of Morgan since it was so deeded to him.

In his report the referee finds that between February 5, 1867, and January 2, 1871, Morgan became the legal owner and holder of \$116,583 worth (at par value) of stock in the company. That on the 17th of January, 1872, "by a resolution of the said board of directors, the president of said corporation, by deed duly executed, deeded the furnace property

---

Morgan v. Lewis.

---

mentioned in said proposition to said David Morgan, and on the same day said David Morgan signed powers of attorney in blank, transferring said stock, and delivered up the certificates of the same to the secretary of the corporation, who wrote the word "cancelled" on the face of each certificate, and inserted said certificates in the stock certificate book of the corporation, as surrendered stock.

"That at the time of said delivery of said certificates of stock to said corporation said David Morgan was the legal owner of said stock represented thereby.

"That said stock so delivered and intended to be surrendered to said corporation, was never afterwards represented, and the same was completely merged in said corporation, and the capital stock of said corporation was treated by the directors as reduced by the amount of \$116,583.

"Said transaction was with the directors of said corporation alone, and without any submission of the same to, or vote on the same by, the general stockholders of said corporation, and without any knowledge or assent of the general stockholders, and that no certificate of decrease was filed with the Secretary of State as required by statute, nor was any notice of the action of the directors ever given.

"That at the time of said attempted surrender said corporation was reported to be solvent.

"That said David Morgan bought said property from, and intended to transfer said stock to, said corporation in good faith and without fraudulent intent.

#### CONCLUSIONS OF LAW.

"The transfer of this stock to the corporation had the effect of reducing the capital stock of the corporation; the directors of the corporation did not have the power to thus reduce the capital stock, and such transfer is void and of no effect, and left the title to said \$116,583 of stock precisely where it had been, and the same as if no effort had been made to transfer the same.

"Unless the power to buy its own stock is expressly conferred in its charter, a corporation can not deal in its own stock, and such transactions are void.

"The fund arising from the individual liability of stockholders is a trust fund set apart under our constitution and statutes for the benefit of creditors, and the directors by no arrangement or dealing whatever can affect or impair this fund.

"I find David Morgan liable on account of said stock, to contribute to the payment of the claims of the creditors of said corporation, to the amount of \$116,583."

The referee finds in another connection, that the capital stock of the company was increased from time to time, until in December, 1870, when it was increased to \$450,000.

The fact that Morgan took immediate possession of the furnace property upon its conveyance to him, is not found by the referee, and does not seem to have entered into the consideration of the case by him, or by the court of common pleas.

It also appeared in the case that the claims of creditors all accrued after the transfer by Morgan of his stock to the company, and of the furnace property, by the latter, to him.

*Stevenson Burke* and *William B. Sanders*, for plaintiff in error.

*W. A. Walden* and *J. F. Hoffman*, for defendant in error.

OWEN, C. J. I. The theory upon which the referee and the court of common pleas must have proceeded, was that the entire transaction by which Morgan acquired the furnace, and the company acquired his stock, was void; that it was beyond the power of the company to engage in the transaction, and that consequently the company acquired no title to the stock, and Morgan acquired none to the furnace property. If this conclusion is sound, the inevitable consequence is, that the company still owns the furnace, and it is assets in the hands of the assignee for the payment of the company's debts. It is an absurdity to assume that Morgan is still the owner of both the furnace and the stock. If he is still liable to creditors as a holder of this stock, the company, by the same reasoning, is owner of the furnace. It is conceded that the proceeding to subject the liability of stockholders to the satisfaction

of the claims of creditors, has throughout ignored this property. It does not appear but that this property alone would satisfy creditors, nor to what extent it would exonerate stockholders from the liability which it is now sought to subject to the satisfaction of creditors' claims. If we were in accord with the referee and court of common pleas, upon the main proposition of the case, still it would be our duty to send the case back for proceedings to subject this property of the company to the satisfaction, *pro tanto*, of its debts.

II. We are of opinion, however, that the referee erred in excluding the evidence which Morgan offered, to throw light upon the transaction by which he assumed to acquire the furnace, and transfer his stock to the company.

The contention of Morgan, in this respect, is not answered by the proposition that the only purpose of offering the rejected proof was to show that the transaction was in good faith, and that this already sufficiently appeared. We have no disposition to call in question the general and well recognized principle that a corporation cannot buy its own stock. It is conceded that this principle proceeds upon a want of power, rather than upon any express prohibition in its charter. With this general principle conceded, however, the right of a corporation to take its own stock in satisfaction of a debt due to it, has long been recognized in this state.

This has been recognized as an exception supposed to rest upon the necessity of avoiding loss. *Coppin v. Greenlees*, 38 Ohio St. 279. It is, nevertheless, a relaxation of the general rule. It is, of course, because of the necessity of avoiding loss, and not because it is for the satisfaction of a debt, that the exception is recognized. If the same or a like necessity of avoiding loss should arise in any of the transactions of the company, it could not, with any show of reason, be contended that the application of this principle of necessity should be limited by any iron rule to the case of taking stock for an otherwise hopeless debt.

The evidence which Morgan offered, and the referee rejected, tended to establish, in substance, that Morgan had

traded to the company this furnace property for stock. That the furnace promised to prove a failure, or, at best, a disappointing and unsatisfactory venture. Contentions arose over the transaction, between Morgan and some of the stockholders. Many of them blamed him for having induced the company to make the purchase. Thereupon they—"many stockholders"—simply proposed a rescission of the contract of purchase; that Morgan take back the furnace and restore to the company the stock he had received for it. The company was out of debt. Nobody could possibly be hurt by a rescission of this contract which had caused so much discontent and contention, and which promised to be a losing venture for the company and Morgan's fellow stockholders. This proof would have established something beyond the mere good faith of the transaction. It would have tended to establish the fact that Morgan yielded to the importunities of many stockholders to rescind a bargain and set at rest an unfortunate controversy which was rapidly breeding discord among the stockholders.

The finding of the referee, that this transaction itself worked a reduction of the capital stock of the company, is not tenable. There was nothing in the way of the company re-issuing this stock or its equivalent to others who may have desired it. There was nothing in the fact that these certificates were marked "cancelled" on the face, by the secretary of the company, and by him treated as surrendered stock, to authorize the finding that the capital stock of the company was reduced. This was no part of the transaction with Morgan, and there was nothing in the fact of the re-exchange of the stock for the furnace which called upon the officers of the company to treat the stock as cancelled, or the capital *pro tanto* reduced. Green's Brice's *Ultra Vires*, 2d ed., 191, 192. This conclusion is not, in principle, qualified by the fact that the stock was not in fact thereafter represented. Then, we should not lose sight of the fact that there was an executed transaction. The exchange—or the re-exchange, rather—had been made, possession of the furnace taken by Morgan, and retained by him for years before the transaction was questioned by any one. To this day it has remained free from direct attack. Certainly, the pos-

session by Morgan of this property which had theretofore been in the possession of the company, was a circumstance proper to be considered with other facts in the case. It at least helps us to distinguish it from the case of *Coppin v. Greenlees*, 38 Ohio St. 275, relied upon by defendants in error. In that case it was held that: "An executory agreement between a manufacturing corporation of this state and one of the stockholders, for the purchase of the stock of such corporation, by the former from the latter, can not be enforced, either by action for specific performance or for damages." That this presents a very different case from one of an executed contract is emphasized by the following language of McIlvaine, J., by whom the opinion was prepared: "If it were averred that the plaintiff had purchased this stock from the defendant, or from others, under an agreement with the company that it buy the same from him when he quit its employment, *or if the contract of purchase by the defendant had been executed, very different questions would arise.*" In *State v. Building Association*, 35 Ohio St. 263, the general principle that a corporation may not traffic in its own stock is recognized. Yet in the same connection it is said: "We do not deny that a corporation has power to receive shares of its stock as security for a debt *or other similar purposes.*" 26 Ga. 28; 84 Ill. 145; 17 N. Y. 507; 114 Mass. 37; 18 Vt. 131. It is apparent from the foregoing that no inflexible rule has been recognized by this court, that a corporation may not in any case, nor for any purpose, receive its own stock. On the contrary, the way is left open for the application of exceptions to the general rule in proper cases. It is one of the established facts in the case that all the debts which are sought to be satisfied by this proceeding were contracted subsequently to the transaction which is assailed. The transfer of the furnace property from the possession of the company to that of Morgan was a fact to which persons giving credit to the company could not safely close their eyes. The inquiry which it would naturally excite would have led to the information that the trade by which the company secured the furnace, and Morgan the stock, had simply been rescinded and the property—stock and fur-



---

Handy v. Sibley.

---

nace—re-exchanged. It being the law of our state that there are exceptions to the general rule, that corporations may not deal in their own stock, all persons dealing with this company must be held to have done so in the light of this state of the law. All persons are as much presumed to know of exceptions to a principle as of the principle itself. The slightest inquiry would have revealed the fact, that, as between himself and the company, Morgan did not sustain the relation of stockholder, at the time these debts were contracted.

In the light of this state of adjudication in this court, we do not hesitate to say that the peculiar state of circumstances, which Morgan offered to prove before the referee, ought to have been received in evidence and considered in the light of other facts which did appear, in order that the referee and courts could have had an opportunity to say whether they did not bring the case within some of the well founded exceptions to the wise and well established general rule.

III. The facts alleged in the petition, concerning the insolvency, etc., of the company, were sufficient to dispense with an averment of the recovery of a judgment against it as a prerequisite to the proceeding to subject the liability of the stockholders to the satisfaction of the corporate debts.

*Judgment reversed and cause remanded.*

SPEAR, J., dissents from the second proposition of the syllabus, and the judgment of reversal.

---

#### HANDY v. SIBLEY.

*Accommodation note and mortgage held as collateral security—Amount recoverable thereon—Sale and purchase by pledgee—Rights of pledgee upon a foreclosure and sale of mortgaged premises.*

1. The holder of an accommodation note, indorsed to him as collateral security, can recover against the accommodation maker no more than the amount intended to be thereby secured.
2. When such note is secured by a mortgage executed by the maker of the note, the pledgee, upon a foreclosure and sale of the mortgaged premises, after receiving payment of the debt due him from the pledgor, will be

---

Handy v. Sibley.

---

held as a trustee of the surplus, for the benefit of the mortgagor and his assigns.

3. A pledgee can not, by a sale and purchase by himself of such accommodation note and mortgage, under a special power of sale and purchase from the pledgor, recover upon a foreclosure of the equity of redemption, a sum in excess of the debt for which the note and mortgage were pledged as collateral security.
4. The children of H. made to him their promissory note for \$25,000, secured by mortgage on real estate worth \$100,000, for his accommodation, and to enable him to pledge the same as collateral and for no other consideration. H. pledged the note and mortgage as collateral security for the payment of a claim of S. against him for \$15,000, and gave to S. a written power to sell the pledge at public or private sale, and to purchase the same. The children, with no knowledge or notice of the power of sale given to S., joined with their father in a written assignment to W. of ten thousand dollars in the note and mortgage, being the surplus over and above the claim of S. and the amount of H.'s indebtedness to W. In consideration of the assignment, W. extended the payment of his claim against H. for one year. S. agreed in writing on the face of the assignment, to hold the note and mortgage, and deliver the same to W., upon receiving the amount of his claim of \$15,000. Upon non-payment of his claim, S. sold the pledged note and mortgage at public sale, and became the purchaser thereof, for the sum of \$15,000. There was no evidence, that W. at or before the time of the assignment, had any notice of the power of sale; nor had the children any notice or knowledge of the sale until long after it occurred. S., after purchasing the note and mortgage, in a proceeding to foreclose the equity of redemption, claimed \$25,000, the amount of the mortgage note, with interest thereon.

*Held:* That he was entitled to recover \$15,000, with interest, and no more.  
(Decided May 22, 1888.)

ERROR to the Circuit Court of Hamilton County.

The original action was commenced in the court of common pleas of Hamilton county, by the defendant in error, James W. Sibley, against Helen A. Handy, Mariette B. Handy, Charles E. Handy, Jennie A. Handy (now Jennie A. Rhodes), Anna W. Handy and Eugene F. Williams, plaintiffs in error, and Truman B. Handy, to foreclose a mortgage, as hereinafter set forth.

On March 27, 1883, Helen A. Handy, Mariette B. Handy, Charles E. Handy, Jennie A. Handy and Anna W. Handy, children of Truman B. Handy, executed and delivered to their father, their promissory note, a copy of which is as follows:

“\$25,000.00. CINCINNATI, *March 27, 1883.*

Ninety days after date we promise to pay to the order of Truman B. Handy, twenty-five thousand (25,000) dollars, payable at the Citizens' National Bank, at Cincinnati, with interest at six per cent. per annum; value received.

HELEN A. HANDY,  
MARIETTE B. HANDY,  
CHAS. E. HANDY,  
JENNIE A. HANDY,  
ANNA W. HANDY.”

“Indorsed: TRUMAN B. HANDY.”

This note was secured by a mortgage deed executed and acknowledged March 27, 1883, by the above named makers of the note, conveying to Truman B. Handy, certain described real estate owned by the mortgagors, and situated in the village of Clifton, in Hamilton county. The note and mortgage were executed to Truman B. Handy by his children, for his accommodation, and simply as surety for him, and to enable him to pledge the same as collateral, or, by having the same discounted, to obtain money for his convenience and accommodation, and for no other consideration. At the time of executing the mortgage, the real estate therein described was unincumbered, and worth one hundred thousand dollars.

On April 2, 1883, Truman B. Handy executed and delivered to James W. Sibley, his promissory note and agreement, a copy of which is as follows:

“\$15,000.00. CINCINNATI, O., *April 2, 1883.*

“Ninety days after date I promise to pay James W. Sibley, or order, fifteen thousand dollars, for value received; having deposited or pledged as collateral security for the payment of this note, a note for twenty-five thousand dollars, secured by mortgage given me by Helen A. Handy, Mariette B. Handy, Chas. E. Handy, Jennie A. Handy and Anna W. Handy. And I hereby give to the holder thereof full power and authority to sell or collect at my expense all or any part or portion thereof, at any place, either in the city of Cincinnati or elsewhere, at public or private sale, at his option, on the non-

---

Handy v. Sibley.

---

performance of the above promise, and at any time thereafter, and without advertising the same or otherwise giving to me any notice. In case of public sale the holder may purchase without being liable to account for more than the net proceeds of such sale.

“TRUMAN B. HANDY.”

“Indorsed: JAMES W. SIBLEY.”

Truman B. Handy indorsed the note for \$25,000, and duly assigned the mortgage securing the same, to James W. Sibley, and deposited them with him, for the purpose and with the power and authority set forth in the above note and agreement of April 2, 1883.

On June 9, 1883, Truman B. Handy and his children executed and delivered to Eugene F. Williams an assignment, of which James W. Sibley had notice, and to which he assented in certain terms; a copy of which assignment and assent is as follows:

“Know all men that whereas Helen A., Mariette B., Charles E., Jennie A. and Anna W. Handy, did, on the 27th day of March, 1883, execute and deliver to Truman B. Handy their certain promissory note for twenty-five thousand dollars (\$25,000.00), and on the same day executed a mortgage to secure the same, payable ninety (90) days after the date thereof, with six (6) per cent. interest, upon certain real estate situate in Clifton, Hamilton county, Ohio, and being the same premises described in a mortgage executed by said Helen A. Handy and others to said Truman B. Handy, recorded in mortgage book 461, page 170, Hamilton county, Ohio, mortgage records;

“And whereas said note and the mortgage securing the same were, for a valuable consideration, assigned and transferred by said Truman B. Handy to one J. W. Sibley, to secure the sum of \$15,000.00 and interest;

“And whereas the said Truman B. Handy is indebted to one Eugene F. Williams in something over ten thousand dollars (\$10,000.00), and being desirous of securing the same;

“Now, therefore, we do hereby agree and consent that the said Eugene F. Williams shall receive an assignment and

---

Handy v. Sibley

---

transfer of ten thousand dollars of, in and to said note and mortgage of \$25,000.00, together with the interest thereon, the same being the surplus over and above the \$15,000.00 due said Sibley, and the interest due him under said note and mortgage, and that said surplus of \$10,000.00 and the interest accruing thereon, secured by said note and mortgage, shall be applied towards the payment of said indebtedness by said Truman B. Handy to said Williams, the said Williams, however, agreeing to extend the payment of his claim secured by this assignment, for one year from the date hereof, and also agreeing to apply to the diminution of said indebtedness all dividends that he may receive from the late firm of Handy, Richardson & Company, of Chicago, interest to be allowed to the said Williams at the rate of six per cent. per annum, until the payment of the indebtedness hereby secured. Said Truman B. Handy hereby so assigns said note and mortgage, and joins in this agreement."

TRUMAN B. HANDY,  
HELEN A. HANDY,  
MARIETTE B. HANDY,  
CHARLES E. HANDY,  
JENNIE A. HANDY,  
ANNA W. HANDY,

EUGENE F. WILLIAMS,  
by *Jordan, Jordan & Williams*,  
His Attorneys.

"I do hereby acknowledge the service upon me of notice of the above and foregoing assignment made by Truman B. Handy and others to Eugene F. Williams, dated June 9th, 1883, and agree hereby to hold said note and mortgage and deliver the same to said Williams or his attorneys, Jordan, Jordan & Williams, or his legal representatives, upon the payment to me of fifteen thousand dollars and interest thereon at six per cent. from March 27, 1883, whether said \$15,000 and interest be paid by said Truman B. Handy or any other person.

"I sign the above with the agreement and understanding that nothing therein contained shall prevent me from enforcing

---

Handy v. Sibley.

---

my security at any time, or shall hold me responsible, in case other persons assert and maintain legal rights against said note or the proceeds thereof, or any part thereof.

“JAMES W SIBLEY.”

The note for \$15,000, being past due and unpaid, James W. Sibley caused the note and mortgage for \$25,000, pledged as collateral security for the payment thereof, to be offered at public auction sale, on July 21, 1883, at the Chamber of Commerce hall in Cincinnati, Ohio, and Sibley being the highest and best bidder, purchased the note and mortgage of \$25,000, for the sum of \$15,000. The sale was made without the consent of the children of Truman B. Handy, none of whom had any notice or knowledge of the existence or terms of the power of attorney, under which Sibley sold the pledged collaterals, until long after the sale; nor did they have any notice of the time or place of such sale; nor did they learn of such sale, until long after it was made. Notice of the sale of the pledge at the Chamber of Commerce, was given to the attorneys of Eugene F. Williams, but not to him personally; and before the sale, the attorneys of Williams informed Sibley by letter, that they had not notified their client of the notice served upon them of the intended sale, and that therefore, he had no knowledge of Sibley's purpose to offer the pledge for sale.

The condition of the mortgage deed having been broken, by reason of the non-payment at maturity of the note for \$25,000, James W. Sibley filed his petition in the court of common pleas to foreclose the equity of redemption; and prayed that the premises described in the mortgage be sold, and that of the proceeds of such sale, there be paid to him the amount due on the mortgage note, to-wit: twenty-five thousand dollars, with interest from March 27, 1883. Eugene F. Williams, who was made defendant in the foreclosure proceedings, claims in his answer, that Sibley is entitled to receive out of the proceeds of the sale of the premises, as against him, the sum of \$15,000, with interest, and no more. On appeal, the circuit court, upon an agreed statement of facts, which hereinbefore have been substantially set forth, adjudged and decreed the equities

---

Handy v. Sibley.

---

of the case to be with Sibley; that the note for \$25,000, set forth in the petition, and the mortgage securing the same, belonged to Sibley; that he was entitled to a decree against the defendants for the full amount thereof, with interest; and that on failure to pay Sibley \$27,802, and costs of suit, the mortgaged premises should be sold, and the last named sum be paid from the proceeds of such sale. .

To reverse the judgment of the circuit court, this petition in error is now prosecuted.

*Jordan & Jordans*, for plaintiffs in error.

*Ramsey, Maxwell & Ramsey*, for defendants in error.

DICKMAN, J. Independent of the power of sale vested in James W. Sibley, by the instrument of writing dated April 2, 1883, he would not have been authorized to sell at public or private sale the note and mortgage of twenty-five thousand dollars, which Truman B. Handy had pledged as collateral security for the payment of his note of fifteen thousand dollars. There is a distinction between a pledge of ordinary chattels and a pledge of commercial paper. A pledge of the latter as collateral security for the payment of a debt, does not, in the absence of a special power for that purpose, authorize the pledgee to sell the securities so pledged, upon default of payment, either at public or private sale. He is bound to hold and collect the same as they become due, and apply the net proceeds to the payment of the debt so secured. The reason assigned for this exception to the general rule in relation to the sale of property pledged is, that such securities, not being usually marketable at their fair value, would generally be sold at a sacrifice, and injustice would thus be done the debtor; and it cannot be presumed it was the intention of the parties thus to deal with the securities. *Wheeler v. Newbould*, 16 N. Y. 392; *Fletcher v. Dickinson*, 7 Allen 23; *Nelson v. Wellington*, 5 Bosw. 178; *Brown v. Ward*, 3 Duer. (N. Y.) 660; *Morris Canal & Banking Co. v. Lewis*, 12 N. J. Eq. 323; *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.*, 82 Ill. 548; *Zimbleman v. Veeder*, 98 Ill. 613. Ordinarily, where there is a deposit of

---

Handy v. Sibley.

---

personal property as security, there is an implied power of sale upon default, upon giving reasonable notice to the debtor to redeem. But the pledgee of negotiable paper, who desires a more summary and speedy means of obtaining money from his security, than by collecting the same when it falls due, or by a bill in chancery and a judicial sale under a regular decree of foreclosure, will obtain a special power of sale from the pledgor. In enforcing his rights, however, by a sale of the pledge, he will be held to the strictest good faith in the execution of the power for the protection of the rights of the pledgor, and will be charged with a trust for the benefit of the debtor, and the benefit of those to whom the debtor may have assigned his interest.

It seems to be beyond controversy, that the note for \$25,000, secured by mortgage, and given by the children of Truman B. Handy to their father, was good for that amount, although purchased by Sibley at the sale for \$15,000 only—that being the amount of the note for which the note of \$25,000 had been pledged as collateral security. Upon foreclosure of the mortgage, and sale of the premises, it appears that a sum would be realized more than sufficient to pay the note of \$25,000—sufficient to pay the principal and interest of the note of \$15,000, and leave a surplus. The question arises, whether Sibley, because of his sale and purchase of the pledge, shall be permitted to retain this surplus embraced within the note of \$25,000 as his own property, or be held to account for it as trustee to Eugene F. Williams.

The mortgage note of \$25,000 was executed to Truman B. Handy by his children, solely for his accommodation, to enable him to pledge the same as collateral, or, by discount to obtain money for his convenience, and for no other consideration. They executed the note and mortgage simply as surety for their father. They had no knowledge of the power of sale given by him to Sibley until long after the sale of the pledge; nor did they have any notice of the time or place of such sale, or learn of the sale until long after it was made. We do not think that under the circumstances, Sibley can subject their property to the payment of \$25,000, when he loaned to their



## Handy v. Sibley.

father only \$15,000; or that he can retain the balance, \$10,000, without any consideration therefor. Handy deposited or pledged the note and mortgage as collateral security for the payment of \$15,000, and no more. If, at the maturity and non-payment of his claim, Sibley, without resorting to a sale of the pledge, had sought to enforce payment by foreclosure of the mortgage, he would have been entitled out of the proceeds of the sale of the premises, only to the amount of his debt. He could not, by resorting to a sale of the pledge, enlarge his equities, or successfully invoke the aid of a court of equity, in an effort to exact from his debtor more than he owed him.

The principle is elementary, and as old as the Roman law, that if the creditor exercises his power of sale over the pledge, he must give the surplus, after paying himself, to the debtor. D. 13, 7, 42; Hunter's R. L. 439. And as between debtor and creditor, whatever may be the effect of a sale as to annulling all the debtor's residuary interest in a pledge of ordinary chattels, when a question arises as to the rights of third parties, who are makers of accommodation paper pledged as collateral security, such parties should not be required to pay the creditor more than the amount of his debt. It has been decided by the supreme court of Massachusetts, in *Fisher v. Fisher*, 98 Mass. 303, that if a promissory note, which is without consideration as between the original parties thereto, is delivered without consideration to another person who pledges it before its maturity, as collateral security for a debt of his own of *less amount* than the face of the note, the pledgees, if they take it without notice, are to be deemed holders for value, and may maintain an action thereon *for the amount due them upon the debt* which it was pledged to secure. In the opinion of the court it was said: "The evidence established that the plaintiffs received the note from the holder before its maturity, without any knowledge of the circumstances under which the defendants had delivered it to the payee, or the purpose for which the latter delivered it to the holder, and that it was held by the plaintiffs as collateral security for a valid debt due from the holder to them. Under the decisions of the court,

---

Handy v. Sibley.

---

these facts proved that the plaintiffs were *bona fide* holders for value, and without notice, and were therefore entitled to recover to the extent of their debt for which the note was pledged as collateral security."

In *Duncan, Sherman & Co. v. Gilbert*, 5 Dutch. (N. J. L. R.), 527, it is stated as the rule, that the holders of accommodation paper, assigned as collateral security, cannot recover of the accommodation maker any more than the consideration actually advanced.

In *Atlas Bank v. Doyle*, 9 R. I. 76, it was held that in case of accommodation paper pledged, the pledgee can recover of the maker only the amount of the debt due him from the pledgor.

And in *Maitland v. The Citizens Bank*, 40 Md. 540, the doctrine was laid down, that, in an action against the maker of a promissory note made for the accommodation of the indorser, brought by the indorsee to whom it was passed as collateral security for the payment of notes discounted by the indorsee for the benefit of the indorser, the measure of the plaintiff's right of recovery is the amount due on the debts embraced by the security; and that it is incumbent on the plaintiff to show what debts were intended to be secured by the note, and the amounts remaining due in respect thereof. "Indeed," says Alvey, J., "all that the plaintiff is entitled to recover is the amount due on the debts intended to be secured, it being conceded that the note was taken as collateral security merely. In such case, while the plaintiff is entitled to be treated as a holder for value, it is only so to the extent necessary to protect the debts intended to be secured."

The note executed by the children of Handy, and pledged as collateral security, being only accommodation paper, and being held in pledge by Sibley, with no other lien upon it, they might, after the payment of the note of \$15,000, have demanded the surrender or cancellation of the collateral. But, by the assignment of June 9, 1883, it was agreed by and between Truman B. Handy, his children, and Eugene F. Williams, that there should be assigned and transferred to Williams ten thousand dollars of and in the note and mortgage of

\$25,000—the surplus over and above the \$15,000 due Sibley—which surplus should be applied towards the payment of Williams' claim against Handy; Williams, however, agreeing to extend the payment of his claim for one year from the date of the assignment. The record does not disclose that Williams had any knowledge of the power which Handy had vested in Sibley, to sell at public or private sale the collateral note and mortgage, and to become the purchaser thereof. The terms of the assignment of June 9th, and of Sibley's written agreement attached thereto, would not bring such knowledge home to Williams any more than to the children of Handy, and it is among the agreed facts that none of the children, until long after the sale of July 21st, 1883, had notice or knowledge of the existence of such power of sale. So far as Williams knew, Sibley was a pledgee of negotiable paper secured by mortgage, with no special authority to sell the same as he would a pledge of ordinary chattels, but only empowered to pursue the usual course of foreclosure proceedings. The surplus \$10,000 was set apart to him, with the concurrence of all parties to the assignment, in view of a *bona fide* indebtedness to him by Handy, and for the valuable consideration that he would extend the payment of his claim against Handy.

There is nothing in the record inconsistent with the presumption that the assignment to Williams of June 9th, 1883, and the agreement by Sibley in relation thereto, were one and the same transaction. Williams having given a valuable consideration, Sibley was bound by his agreement to hold the note and mortgage, and deliver the same to Williams, upon receiving payment of \$15,000 and interest. The proviso of Sibley, that nothing contained in the writing signed by him should prevent him from enforcing his security at any time, would not be notice to Williams of a special power of sale, but might convey the meaning that the one year's extension of payment to Handy should not interfere with Sibley's right to enforce his security at any time by a regular foreclosure of the mortgage.

As between Williams and Handy, and the children of Handy, the equities of the children in the surplus of the note and mortgage, after paying Sibley's claim of \$15,000, would, under

---

 Foster, Adm'r v. Wise, Adm'r.
 

---

the assignment of June 9th, follow and inure to the benefit of Williams. Nor do we conceive that the rights of Williams should be concluded in equity, by the sale of the pledge under a power of which he was not cognizant at the time he agreed with Handy to extend the time for the payment of his claim against him, and which extension he might not have granted, if Sibley had definitely notified him, as he might have done, of his power to sell and purchase the pledged collaterals. The existence of the power of sale was a fact, which, under the circumstances, Sibley, as a trustee, should have disclosed to Williams, and his failure to communicate the fact to him, was contrary to the principles of equity. In our opinion, the defendant in error, James W. Sibley, has no right to ask anything more than the full payment of his claim, with interest; and Eugene F. Williams is entitled to receive the surplus of the mortgage of twenty-five thousand dollars, over and above the sum of fifteen thousand dollars and interest, owing by Truman B. Handy to the defendant in error.

*Judgment reversed, and judgment for Eugene F. Williams.*

---

 FOSTER, ADM'X v. WISE, ADM'R.
 

---

*Executor—Conversion by, of assets of estate—Subsequent execution of new bond by—  
When sureties on new bond liable for assets so converted—Section  
6020, Revised Statutes, construed.*

1. The sureties on an administration bond, given by an executor who has been removed, are liable thereon to the administrator appointed in his place for the indebtedness of such executor to the estate for assets received by him and converted to his own use; and a recovery may be had therefor by the successor in a suit on the administration bond. *Slagel v. Entrekin*, 44 Ohio St. 637, approved and followed.
2. An executor gave a new bond as required by the probate court, on the motion of his sureties on the prior bond to be relieved under section 6204 of the Revised Statutes. Subsequently the executor was removed by the court, and an administrator with the will annexed was appointed in his place. Prior to giving the new bond, which was in the form required by section 5996 of the Revised Stat-

---

Foster, Adm'r v. Wise, Adm'r.

---

utes, the executor had collected and converted to his own use all the assets of the estate. *Held*: That the sureties on the new bond are liable for the indebtedness of the executor to the estate for all the assets so collected and converted to his own use.

(Decided May 1, 1888.)

### ERROR to the Circuit Court of Stark County.

The original suit was upon the bond of an executor who had been removed, and was prosecuted by his successor in the trust as administrator *de bonis non* with the will annexed. The bond in suit was the third one that had been given by the executor, and, upon motion of the administratrix of one of the defendants, the sureties upon the first and second bonds were made parties by order of the court. Issues of fact having been made up, the case was, by agreement of parties, tried to the court, which, upon a special finding of facts, rendered judgment in favor of the plaintiff against the obligors of the bond in suit for the sum of \$4,630.20.

The finding of facts is as follows:

"The parties to said issues tried, waived the intervention of a jury, and submitted the cause to be tried by the court. And the court having heard counsel in argument, and being fully advised in the premises, finds that Angeline A. Brobst died in the year 1870, and left the last will and testament, of which Henry Pomerene was the executor; that he accepted the trust; that the will was, on the 23d day of November, 1870, duly probated by the Probate Court of Stark County, Ohio; that on the 23d day of November, 1870, said Henry Pomerene gave bond as such executor, which was duly approved by the probate court, with James Taylor and Charles Herzer, his sureties. That on the 15th day of March, 1873, the said Henry Pomerene was required by the said court to give an additional bond as such executor, and on the 22d day of March, 1873, he did give such additional bond, which was duly approved by the probate court aforesaid, with James Corrigan, John Pollock and J. H. Burgert, his sureties. That said original bond and said additional bond were conditioned according to law. That on the 15th day of February, 1878,

---

Foster, Adm'r v. Wise, Adm'r.

---

said Henry Pomerene was duly ordered by said probate court to give a new bond as such executor, which he did on the 20th day of February, 1878, and which was conditioned according to law, and a copy is attached to the petition in this case, with the defendants, D. P. Foster and H. H. Hatch, as his sureties thereon, which said bond was then approved by the said probate court, and is the bond in suit. That prior to the giving of said last-mentioned bond, Henry Pomerene had received assets belonging to said estate, and had converted the same into money, and had paid out sums of money as such executor. That on the 4th day of November, 1875, said Henry Pomerene filed in said court his account as such executor, showing a balance in his hands, of the sum of \$3,736.71, and which was the true sum in his hands, which account was duly approved by said court, and said Pomerene then ordered to invest the said balance at interest.

“That said Pomerene received no further sums of money, or any other property belonging to said estate, after the filing of said account. That he never paid out any sums on account of his said trust, save that he paid interest on the balance to Sophia Shriver, who was, under the will, entitled to receive the same as follows: Interest was paid up to November 4th, 1880, and the sum of \$50.00 on interest, on November 4th, 1881. That Henry Pomerene acted only as executor of the will until he was removed, and that no trustee was appointed or required in law. That between the time of his appointment and the giving of the last bond heretofore referred to, upon which the defendants, Foster and Hatch, are sureties, said Pomerene wasted all of the estate of said Angeline A. Brobst, and converted it to his own use, so that at the time the defendants, Foster and Hatch, signed said bond, as sureties, for said executor, there was, in point of fact, no money or property belonging to said estate, on hand unwasted. That said Pomerene was by said court, removed as such executor on the 13th day of March, A. D. 1882, and the said Isaac Shriver, was, by the court, on said 13th day of March, A. D. 1882, duly appointed administrator *de bonis non*, with the will annexed, and prior to the commencement of this ac-

tion he qualified as such, and on the 7th day of April, A. D. 1882, he, as such administrator, demanded payment of said Henry Pomerene, of the sum of \$3,736.71, and interest thereon from Nov. 4th, 1880, less \$50.00, paid Nov. 4th, 1881, as money and estate of said Angeline A. Brobst, that had come into his hands as executor, but said Pomerene neglected and refused to pay to him the said sum or any part thereof. That the defendants entered into the undertaking attached to the petition, and marked "Exhibit A," (which is in the usual form.)

"That said Isaac Shriver was, by said probate court, removed as such administrator on the 2d day of June, 1884, and on June 25, 1884, Henry A. Wise was duly appointed and qualified as administrator *de bonis non*, with the will annexed, of said Angeline A. Brobst, deceased, and that he is now acting as such, and the action has been duly revived in his name as administrator."

The will of the testator, Angeline A. Brobst (a copy of which is inserted in the finding), after making certain small bequests to others, gave "all the remainder" of her property "to be put on interest for the benefit" of her niece, Sophia Shriver, during the time she should remain the wife of Isaac Shriver, and during her life, should she so long remain his wife, and then "the principal and interest not paid over" to go to the heirs of the body of her niece, and if she should die without such heirs, then to Christian B. Stump and his heirs. She then appointed the defendant, Henry Pomerene, to be the executor of her will.

There is then a finding of the amount due, \$4,630.20, on which judgment was rendered. A motion for a new trial was made, and overruled, and exceptions reserved.

The judgment having been affirmed by the circuit court, this proceeding is prosecuted to reverse both judgments.

MINSHALL, J. No question is made upon the record as to the amount due the estate from the principal, Henry Pomerene, for assets received by him and converted to his own use. The contention is, (1) that the amount found due by the probate court, being for assets that had been received and converted to

---

Foster, Adm'r v. Wise, Adm'r.

---

his own use by the executor, and so not in specie, can not be recovered upon the bond by the successor in the trust; and (2), that the sureties upon the bond in suit are only liable for assets converted by the principal after its execution, and that they are not liable for assets received and converted by him prior to its execution.

1. The first contention is based upon what was the rule of the common law. By that rule an administrator or executor, who had resigned, or been removed, was liable to no action at the suit of the administrator *de bonis non*, except for the recovery of such assets as remained in specie unadministered; and the several creditors, legatees and distributees, to whom he was liable, were driven to their several suits, if their claims remained unpaid. This resulted in great inconvenience. As observed by Thurman, J., in *Tracy v. Card's Adm'r*, 2 Ohio St. 442: "There might be as many suits as there were individuals of these various classes; the expenses of litigation were oftentimes greater than the amount to be recovered; and the difficulties in doing justice between the parties and properly settling the estate, were manifold and grievous." The learned judge then shows that this rule was abrogated at a very early day in this state, by the enactment of a statute which transfers the entire estate to the administrator *de bonis non*, and authorizes him to maintain a suit for its recovery.

The provisions on the subject as codified are found in section 6020 of the Revised Statutes. By this section the right is conferred on an administrator appointed in the place of one who has been removed, not only to maintain a suit against his predecessor and the sureties on his bond for "all the personal effects and assets of the estate unadministered;" but, also, for "all damages arising from the maladministration or omission" of such predecessor. So that, whether or not we regard the liability of an executor or administrator to the estate for assets that he has received and converted to his own use, as itself an asset of the estate (*Brown v. State*, 23 Kan. 235), there can be no question, but that such conversion is maladministration for which he and his sureties are liable in damages upon his bond at the suit of his successor in the trust.



The question should, however, be regarded as settled by the decision in *Slagle v. Entrekin*, 44 Ohio St. 637, where it was held that under section 6020 of the Revised Statutes, an administrator appointed to fill the place of an executor or administrator who has resigned or been removed, is entitled to receive from the latter his indebtedness to the estate on account of assets received and converted to his own use, and may maintain an action upon the administration bond of the former executor or administrator and his sureties to recover the same. The authorities are there collected.

In legal propriety there is no such office as an administrator *de bonis non* under our statute regulating the settlement of the estates of deceased persons. An administrator appointed to fill the place of a personal representative, who has resigned or been removed, is the successor in the trust of his predecessor, and is clothed with all the rights of the estate he is appointed to administer, and is therefore entitled to recover the indebtedness of his predecessor to the estate for assets received and converted to his own use, as well as for such as remain in specie.

2. The sureties upon the second bond having been relieved by the court upon the motion of one of them, the principal, Pomerene, was required to give a new bond, which he did by executing the one in suit with the defendant H. H. Hatch and the intestate of the defendant Harriet L. Foster as sureties thereon; and the court having found that prior to this time, the executor had collected all the assets and converted them to his own use, it is now claimed, that the sureties on the bond in suit are not liable therefor. In other words, their claim is, that they are only liable for such assets as were converted by the executor after the execution of the bond on which they are sureties, and that the sureties on the prior bonds are alone liable for such as were converted before. This we think is not tenable. The case relied on, *Eichelberger v. Gross*, 42 Ohio St. 549, is not in point. There the suit was on the first bond that had been given by a guardian, and the sureties on it were held liable for an embezzlement of the funds by the guardian before the second bond was given. All that is there said as

---

Foster, Adm'r v. Wise, Adm'r.

---

to the liability of the sureties upon the second bond was outside of the case and mere *obiter*. The obligation of the bond is the thing to be considered. It, among other things, stipulates that the executor "shall administer, according to law and to the will of the testatrix, all her goods, chattels, etc., which shall at any time come to the possession of the said executor." The discharge of this obligation required that the executor should administer the estate as required by the law and the will, or deliver it to his successor to be so administered, should he resign or be removed. The fact that prior to executing the bond he had converted the assets to his own use, in no way affected the obligation to account for all that had been received by him belonging to the estate; and it was to secure this obligation that the bond was required and given. There has been, it seems, no direct decision upon the question by this court, but what has been said is supported by the general current of the decisions in the other states. *Scofield v. Churchill*, 72 N. Y. 565; *Pinkstaff v. The People*, 59 Ill. 148; *Choat v. Arrington*, 116 Mass. 552; *Brown v. The State*, 23 Kan. 235; *Bobo v. Vaiden*, 20 S. C. 271; *Morris v. Morris*, 9 Heisk. (Tenn.) 814.

In *Pinkstaff v. The People*, *supra*, it is said, "whether he," the administrator, "had, in fact, used the trust funds or not, when this (the second) bond was given, they were, in the eye of the law, then in his hands to be administered, and the bond was given as security that they should be so administered." And in *Brown v. The State*, *supra*, it is said, that the liability of an administrator to an estate for amounts he has received and converted to his own use, is "assets in his hands belonging to the estate," which it is his duty to make available to the estate, as required by law. Some of the authorities are to the effect that where a surety on an administrator's bond petitions for relief, and a new bond is required and given, the second bond becomes the primary security, not only as to the surety who petitioned, but also as to the other sureties on the first bond. *Bobo v. Vaiden*, and *Morris v. Morris*, *supra*.

Whether the sureties upon the bond in suit have the right to compel contribution from the sureties upon both, or either, of

Gunsaulius, Adm'r v. Pettit, Adm'r.

the other bonds, need not now be determined. It is sufficient to determine, as we now do, that they are liable to the present administrator upon the bond given by them, for the entire indebtedness of the executor to the estate for whose faithful administration of its assets they bound themselves as sureties. There is no privity of contract between them and the sureties upon the prior bonds, and any remedy they may have against them must be sought in a proper suit for that purpose. *Choate v. Arrington, supra.* This is an action for money only, and they have no right to insist that a proper judgment against themselves should be delayed until they may be able to recover from another a part of what has been adjudged against themselves.

It is also argued that at the time the bond in suit was given, Pomerene held the assets as trustee under the will by which he was authorized to invest them for the benefit of Mrs. Shriver. It is a sufficient answer to this to say, that he never qualified as such trustee, and no such investment was made. He cannot, therefore, be regarded as having acted in any other capacity than as executor. *Prior v. Talbot*, 10 Cush. 1. Moreover, the sureties on the bond in suit are estopped from asserting that he had ceased to be an executor and was only a trustee. In all cases where the condition of a deed has reference to any particular thing, the obligor shall be estopped to say there is no such thing. *Douglass v. Scott*, 5 Ohio, 195.

*Judgment affirmed.*

GUNSAULLUS, ADM'R v. PETTIT, ADM'R.

46	27
50	50
46	37
56	580

*Jury—Right of trial by—Appeal—Practice.*

The right to trial by jury does not depend upon the principles upon which relief is asked, but upon the nature and character of the relief sought. If the relief sought is a judgment for money only, the fact that before the adoption of our reformed system of procedure, the proper remedy would have been by a suit in equity, does not affect the right of either party to a trial by jury upon any issue of fact made by the pleadings.

(Decided May 22, 1888.)

---

Gunsaulus, Adm'r v. Pettit, Adm'r.

---

ERROR to the Circuit Court of Huron County.

*F. D. Gunsaulus* and *G. T. Stewart*, for plaintiff in error.

*T. H. Wiggins*, for defendant in error.

MINSHALL, J. The suit below was brought by the administrator of a deceased wife against the administrator of her deceased husband, and sought to charge his estate with a claim for money had and received by him in trust for her. They intermarried in 1836, she being at the time the widow of Merritt Pettit deceased, in whose lands she had a dower estate. It is claimed that her last husband, the decedent of the plaintiff in error, received the rent arising from the dower estate of his wife in the lands of her former husband, amounting to \$2,950, and, also, the money paid by a railway company for the right of way through her dower estate, and that in 1868 he received her share in the estate of her father amounting to \$650.59; that all these sums were received by the husband in the right of the wife, without intention to make the same his own; that he so held the money in trust for her, and had promised to invest it for her use, but died before doing so. All the material facts were controverted by the answer. The case was tried to the court, a jury being waived; the court found for the defendant and dismissed the petition. Thereupon the plaintiff below appealed to the district court; and, the cause having been transferred to the circuit court, a motion was made therein to dismiss the appeal on the ground that neither party was entitled to a jury on the issues of fact joined between them. The motion was overruled, and, a trial being had, the circuit court rendered a judgment in favor of the appellant. In refusing to dismiss the appeal we think the court erred.

The constitutional limitation as to trial by jury is on the power to abridge, and not on the power to extend, the right of trial by that method. The right may be extended, but not abridged. So that the question is not merely, whether at common law, either party had, upon the issues joined, a right to trial by jury, but whether under the provisions of our code of civil procedure such right is awarded him. The code provides, § 5130 R. S.,

that issues of fact arising in actions for the recovery of money only, shall be tried by a jury, unless waived by the parties; and such actions are not appealable. § 5226 R. S. Hence the right of a party to trial by jury, in a given case, does not depend upon the character of the principles upon which he may base his right to relief, but upon the nature and character of the relief sought. If the relief sought is a money judgment only, and all that is required to afford him a remedy, it is immaterial whether his right of action is based upon what were formerly regarded as equitable, or upon what were regarded as legal, principles. In either case the remedy must be sought in the civil action of the code; and, in it, trial by jury is given upon all issues of fact where the relief sought is a money judgment only. See *Alsdorf v. Reed*, 45 Ohio St. 653, and cases there cited.

The claim of the plaintiff below, when reduced to its substance, is, that the husband of his intestate received moneys belonging to her, that he promised to hold and invest for her use. For not doing so, he asks to recover a judgment for money against the administrator of the husband for the amount so received; and such judgment and none other was rendered by the circuit court. The fact that the court ordered that it should be a lien upon all the lands of which the husband died seized, added nothing to the relief granted; for such would have been its effect had no such order been made, had the court had jurisdiction to hear and determine the case on appeal.

The fact that prior to the code the only remedy would have been a suit in equity, does not affect the right of either party to demand a jury trial upon the issues of fact joined in the action. Hence the case of *Huber v. Huber's Adm'r*, 10 Ohio, 371, has no application to the question presented here. The case then was not appealable, and the circuit court erred in not sustaining the motion to dismiss the same.

*Judgment reversed and appeal dismissed.*

---

Monnett v. Monnett, Adm'r.

---

## MONNETT v. MONNETT, ADM'R.

*Written instruments—Interpretation of—When oral testimony admissible to aid in—Pleadings—Practice.*

M. executed and delivered to T. J. M. a written instrument, the terms of which are, "the Woolen Mill Company, of Bucyrus, Ohio, having sold to M. one-half of the Woolen Mill property for the sum of seven thousand five hundred dollars, two thousand five hundred dollars to be paid April 1, 1877, the other five thousand dollars with the following provisions: after M. receives dividends to the amount of ten per cent. on the money he puts into the mills, T. J. M. is to receive dividends as interest on the five thousand dollars above named *pro rata* with the firm for the term of five years, and if the mills do not pay dividends up to ten per cent. on the money put in by M. at the expiration of five years, he may continue the same conditions until they do." *Held:*

1. That, within the rules of evidence, which forbid oral testimony to contradict or vary the terms of written agreements, but permit such testimony to prove the circumstances under which they were made, to enable the courts to put themselves in the place of the parties, with all the information possessed by them, the better to understand the terms employed in the contract, and arrive at the intention of the parties, it is competent to show that the Woolen Mill Company, of Bucyrus, Ohio, was the name of a co-partnership which consisted of T. J. M. and another person, who, at the date of the instrument, were the owners of the Woolen Mill property referred to; that the half thereof stated in the instrument as having been sold to M., was the plaintiff's undivided interest in the property, and that the other co-partner's undivided interest, was, about that time, sold to another person for the like price; also, that after M. executed the instrument, and delivered the same to T. J. M., he paid to him the twenty-five hundred dollars therein stipulated to be paid April 1, 1877, and that thereupon T. J. M. and his co-partner united in a deed of conveyance to M. and the other purchaser, the consideration therein expressed being fifteen thousand dollars.
2. That the purchase price of T. J. M.'s undivided interest in the property, is seven thousand five hundred dollars, to be paid him by M., the purchaser; twenty-five hundred dollars thereof to be paid April 1, 1877, but the other five thousand dollars not until the expiration of five years, during which time, T. J. M. is to receive as interest thereon, a share of the dividends remaining after M. shall receive dividends earned by the mill equal to ten per cent. on the amount invested by him in the mill; if the dividends do not equal that amount, the provision for the payment of interest to T. J. M. fails, which enables M. to retain the five thousand dollars of the purchase-money for five years without interest, and to continue, after the expiration of that period, to retain it on the same conditions as to interest, until the mill shall pay dividends equal to ten per cent. on his investment. But the principal of five thousand dollars

---

Monnett v. Monnett, Adm'r.

---

is payable in any event at the end of five years from the date of the instrument, unless M. should then elect to continue the conditions in regard to interest; and a sale by him before that time, of his interest in the property, is a conclusive election not to do so, whereupon the principal becomes payable absolutely.

3. That in an action brought on the instrument by T. J. M., against M.'s administrators, to recover the five thousand dollars, where the reformation of the instrument is not sought by the defendants, and their pleadings do not entitle them to such relief, parol evidence is inadmissible to prove that the twenty-five hundred dollars stipulated to be paid April 1, 1877, was the full purchase price of the property, or that the plaintiff was to be paid no part of the five thousand dollars, unless the net earnings of the mill should exceed ten per cent. on the amount of money invested in the mill by M.
4. In the trial of such action, the interpretation of the instrument belongs to the court, and it is error to submit its construction to the jury.

(Decided May 22, 1888)

**ERROR to the Circuit Court of Crawford County.**

The plaintiff in error, who was plaintiff below, on the 20th day of May, 1882, commenced his action in the Court of Common Pleas of Crawford County, against the administrators of the estate of Abraham Monnett, deceased, upon the following written instrument:

“BUCYRUS, OHIO, *February 22, 1877.*

“The Woolen Mill Company of Bucyrus, Ohio, having sold to A. Monnett, of Marion County, Ohio, one-half of Woolen Mill Property, for the sum of seven thousand five hundred dollars (\$7,500.00), two thousand five hundred dollars (\$2,500.00) to be paid April 1st, 1877, the other five thousand dollars (\$5,000.00) with the following provisions:

“After the above A. Monnett receives dividends to the amount of ten per cent. on the money he puts into mill and manufactures, T. J. Monnett is to receive dividends, as interest on the five thousand dollars (\$5,000.00) above named, pro rata with the firm, for the term of five years, and if the mills do not pay dividends up to ten per cent. on the money put in by A. Monnett above-named, at the expiration of the five years, he may continue the same conditions until they do.

“A. MONNETT.”

*Endorsed*—“Received on the within article two thousand five hundred dollars. April 1st, 1877.”

The case made by the petition with the amendments is, that the Woolen Mill Company mentioned in the writing, was at its date the name of a co-partnership, consisting of the plaintiff and James G. Frazier, who were the owners of the Woolen Mill property. The plaintiff sold his undivided interest in the property, to Abraham Monnett, for the sum of seven thousand five hundred dollars, and Abraham Monnett executed and delivered to him the written instrument sued on. About the same time, Frazier's undivided interest in the property was sold to Quincy A. Rouse and William Rouse; and afterwards on the 2nd day of April, 1877, the plaintiff and Frazier, by their joint deed, conveyed the whole of the property to the purchasers, the consideration therein named being fifteen thousand dollars. The Rouses paid seven thousand five hundred dollars, their half of the purchase-price, and Abraham Monnett, in pursuance of his written obligation, paid the plaintiff the two thousand five hundred dollars, which by its terms, became due April 1st, 1877, and which is credited thereon. In April, 1878, Abraham Monnett sold and conveyed his undivided half of the property, to Horace Rouse, whereby, it is claimed, he put it out of his power to further comply with the stipulations of his written agreement, and, after the expiration of five years from its date, the plaintiff brought his action against Abraham Monnett's administrators (he in the meantime having died), to recover the five thousand dollars alleged to be due, together with interest from April 1st, 1877. Before the commencement of the action, a claim therefor, duly authenticated, was presented to the administrators for allowance, which was by them rejected.

Four answers were filed by the defendants, but the real defense, and the only one made at the trial, was that contained in the second paragraph of the amended answer, which avers that the written instrument sued on "is ambiguous and uncertain, and does not clearly set out the true agreement made by said parties; that the true agreement made by said parties and intended to be expressed by said written memorandum, was as follows: Plaintiff sold to said Abraham Monnett his interest in the Woolen Mill property, for the sum of twenty-five



hundred dollars, to be paid, and which was, in fact, paid by said Abraham Monnett on April 1st, 1877, which sum was in full of the purchase-price thereof; but plaintiff retained a conditional interest in the earnings of said Woolen Mill as follows: It was agreed that said Abraham Monnett was first to receive dividends out of the net earnings and profits of said Woolen Mills, equal to ten per cent. on the amount of money by him put into said mill and manufactures; after which plaintiff was to receive as his interest in the net earnings and profits thereof, a pro rata dividend thereof with the firm for five years (to the amount of five thousand dollars), provided said Woolen Mills earned that amount in excess of the ten per cent. first to be paid to said Abraham Monnett, but if said Woolen Mill did not earn an excess over said ten per cent. to be paid to said Abraham Monnett, then plaintiff was to receive nothing, nor have no other or further interest therein."

The plaintiff replied, controverting the allegations of the answer, and without objection by either party the case was tried to a jury. A verdict was returned for the defendant, and a motion for a new trial having been overruled, a bill of exceptions was taken, purporting to set out all of the evidence and charge of the court, from which it appears, that the evidence offered by the defendant on the trial in support of his defense, consisted of conversations the witnesses claimed to have had with the plaintiff, concerning the terms of the sale to Abraham Monnett, and some testimony relating to the financial condition and business habits of Abraham and the plaintiff. This evidence was permitted to be given over the plaintiff's objection, and he duly excepted.

The court in its charge, after stating the issues made by the pleadings, said to the jury:

"The court finds that the said written memorandum attached to the plaintiff's petition, marked 'Exhibit A,' is ambiguous and uncertain in its terms and conditions, and submits the construction thereof to the jury. In giving construction to the same the intention of the parties will govern.

---

Monnett v. Monnett, Adm'r.

---

The contract is what Abraham Monnett and Thomas J. Monnett agreed and intended it to be."

To this the plaintiff excepted.

The court further charged the jury, "that the plaintiff must make out his case by a fair preponderance of the evidence," and also that "the defendants must make out their case by a fair preponderance of the evidence;" and "if the contract is as claimed by the plaintiff the verdict must be for the plaintiff," and "if the contract is as claimed by the defendants the verdict must be for the defendants."

Judgment was entered on the verdict and the plaintiff prosecuted error to the circuit court, where the judgment was affirmed, and thereupon filed his petition in error in this court.

*S. R. Harris, Jacob Scroggs and F. S. Monnett*, for plaintiff in error.

*Finley, Eaton & Bennett, W. Z. Davis and J. C. Tobias*, for defendants in error.

WILLIAMS, J. The written instrument on which the plaintiff brought his action, is either capable of construction, or it is void for uncertainty; for, if the terms employed by the parties, though intended for a contract, be so incomplete or ambiguous that, after applying to them all the helps which the rules of interpretation afford and permit, they are still so uncertain, that what the parties mutually assented to, cannot be ascertained, the consequence is the same as when there is no assent; there is no contract. But, if possible with such helps, they should be given such construction as will uphold the contract, and give effect to the intention of the parties, rather than one which renders them void for uncertainty; and to avoid the latter alternative, the words will be taken most strongly against the person employing them, especially where he is the only party subscribing the contract. The words of obligation in a contract, "are interpreted most strongly against the obligor, for it is presumed that he used those most favorable to his interests; and all doubtful terms or ambiguous words are to be construed against him. He who

speaks, should speak plainly, or the other party may explain to his own advantage." *State v. Worthington*, 7 Ohio, pt. 1, p. 171.

Though the rules of evidence exclude oral testimony to contradict or vary the terms of written agreements, they permit proof of the circumstances under which they were made, the surroundings of the parties, their relations to each other, and to the subject-matter of the contract, to enable the courts called upon to interpret them, to put themselves in the place of the parties, with all the information possessed by them, the better to understand the terms employed in the contract, arrive at the intention of the parties, and give effect to the agreement.

Consistently with these rules, it was without objection, shown on the trial, that the "Woolen Mill Company of Bucyrus" was the name of a co-partnership, which consisted of the plaintiff and another, who, at the date of instrument sued on, were the owners of the Woolen Mill property therein mentioned; and that the half of the property therein stated as having been sold to Abraham Monnett, was the plaintiff's undivided interest in it. The answer admits this, for it avers that "the plaintiff sold to said Abraham Monnett his interest in the said Woolen Mill property." It was also shown, and not controverted, that Abraham Monnett executed the written obligation, delivered the same to the plaintiff, and paid to him the twenty-five hundred dollars stipulated to be paid April 1st, 1877, and that a deed of conveyance was soon thereafter executed to Abraham Monnett, vesting in him the undivided half of the property, which he afterward sold and conveyed to another person.

Aided by these extrinsic facts, no serious difficulty is encountered in the construction of the instrument. It recites, that the sale was for the sum of seven thousand five hundred dollars, and provides that twenty-five hundred dollars thereof is to be paid April 1st, 1877. It is true, it does not state that Abraham Monnett is to pay it, nor contain any direct promise to pay to the plaintiff. But since Abraham Monnett purchased the property of the plaintiff, and executed and delivered to him the written instrument, stating the purchase by him, and the terms and amounts of the payments

therefor, it would be idle to say, that the twenty-five hundred dollars was not to be paid by Abraham Monnett to the plaintiff. About this there is no controversy, and accordingly Abraham Monnett, contemporaneously with the execution of the deed to him, paid to the plaintiff this twenty-five hundred dollars. The obligation to pay the balance of the purchase price of the property is equally clear. Whatever of uncertainty there is, relates to the time and mode of payment. The language of the instrument, "two thousand five hundred dollars to be paid April 1st, 1877, the other five thousand dollars with the following provisions," plainly imports that the five thousand dollars is to be paid, as well as the twenty-five hundred dollars, and by the same person, and to the same person, except as otherwise controlled by the provisions which follow. There is nothing in those provisions which discharges the obligation to pay the five thousand dollars, or extinguishes the right of the plaintiff to receive it. They are not only consistent with, but confirm and accentuate, both the obligation of Abraham Monnett to pay, and the right of the plaintiff to receive payment. They provide, that after Abraham Monnett receives dividends to the amount of ten per cent. on the money by him invested in the mill, the plaintiff is to receive a share of the remaining dividends, as interest on the five thousand dollars, for the term of five years. The right of the plaintiff to the interest in the event provided for, would seem to establish his title to the principal also; and, as Abraham Monnett is the party binding himself to that obligation, the duty became his, to pay the plaintiff the interest, as it accrued according to its terms. If the mills should not pay a dividend of ten per cent. on the money invested by Abraham Monnett, the provision for the payment of interest to the plaintiff fails; the result of which is, that Abraham Monnett is enabled to retain the five thousand dollars of purchase money for the property, for the five years without interest, and he might, at the expiration of that period, continue to retain it, on the same conditions as to interest, until the mill should pay dividends equal to ten per cent. on his investment. Under these stipulations, the principal of five thousand dollars, became due in any event at the expiration of five years from the

date of the obligation, unless Abraham Monnett should then elect to continue the conditions in regard to the interest therein set forth, which he did not do. On the contrary, he sold and conveyed away his undivided half of the property, ceased to have any interest in, or control over it, and thus put it out of his power to perform the stipulations for the payment of interest, which were beneficial to the plaintiff, and which no doubt constituted the consideration, at least in part, for the credit given on that part of the purchase price of the property. This was a conclusive election, on the part of Abraham Monnett, not to prolong the time for the payment of the five thousand dollars on the conditions specified, and the money became payable absolutely.

This, we think, is the proper interpretation of the obligation, aided by such extrinsic facts, either admitted by the pleadings, or not controverted on the trial, as, consistently with the rules of evidence, may be properly considered in giving construction to it; and the trial court erred in submitting its construction to the jury. The extrinsic circumstances material to its construction, were undisputed and definitely ascertained; and if they were not, it was still the duty of the court to give construction to the instrument, for the construction of all written instruments belongs to the court alone; "and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed, as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them." *Neilson v. Hofford*, 8 M. & M. 806, 823.

2. It follows, also, that the court erred in admitting the evidence, given by the defendants, to contradict the terms of the instrument, and engraft upon it others it did not contain, unless such evidence was competent, under the pleadings, with the view to its reformation.

We know that the rules, which forbid the introduction of parol evidence to control written contracts, do not exclude proof of the consideration, or of promises or agreements wholly collateral to the writing, like agreements between sureties or joint

---

Andrews v. Lembeck.

---

promisors; nor apply, where express reference is made in the written instrument, to a parol contract, or where the written instrument does not purport to be a complete expression of the contract, or evidently appears to express only some part of it, and that which is sought to be proven, does not contradict its terms, but is consistent with them. But the evidence admitted in this case, does not fall within either of these classes. Its purpose and tendency were, to prove that the instrument did not contain the true agreement between the parties, and to establish a contract materially different from that expressed by it. Such evidence can not be admitted, except when the reformation of the instrument is sought in equity. *Holzworth v. Koch*, 26 Ohio St. 33; *Neil v. The Board of Trustees*, 31 Ohio St. 15; *Denton v. Whitney*, 31 Ohio St. 89. And the party asking its reformation, must by proper allegations in his pleading, show his right to such relief. *White v. Denman*, 1 Ohio St. 110. The defendants below neither sought the remedy, nor do their pleadings entitle them to that relief.

There being no dispute about the facts which entitle the plaintiff to judgment, there is no reason why the case should not now be finally disposed of.

Judgments of the circuit court, and court of common pleas reversed, and judgment for the plaintiff.

---

ANDREWS v. LEMBECK.

*Summons—When person privileged from service of.*

A person attending the hearing of an application for an injunction in a case in which he is interested as a party, in a county other than that of his residence, is privileged from the service of summons while going to, attending, and returning from, the place of such hearing.

(Decided October 16, 1888.)

ERROR to the Circuit Court of Cuyahoga County.

Julius Lembeck commenced an action against E. E. Andrews in the Court of Common Pleas of Medina County, applied for a temporary injunction therein, and being unable to secure a

---

Andrews v. Lembeck.

---

hearing thereof before either of the judges of that subdivision, served on Andrews a notice of an intended application to the Hon. Henry McKinney, one of the judges within such district, at his place of residence in Cuyahoga county, for such temporary injunction, which application was made accordingly. Andrews, with his counsel, attended such hearing (which was upon the affidavits previously filed), and did so upon the advice of his counsel that his presence might be necessary during such hearing. After such hearing was had, and before sufficient time had elapsed for him to depart for his home by the first train leaving therefor, he was served with a summons issued from the Court of Common Pleas of Cuyahoga County, in an action commenced against him by Lembeck, who used no fraud, and had no intention of bringing him into the latter county for the purpose of securing the service upon him.

The court of common pleas, upon his motion, quashed the summons and dismissed the action, holding that he ought not to be held to answer in Cuyahoga county.

The circuit court reversed this order, and the present proceeding is prosecuted to reverse this judgment of reversal.

*Boynton, Hale & Horr*, for plaintiff in error.

A person attending an application for an injunction in a case in which he is interested as a party, in a jurisdiction outside of that of his residence, is absolutely privileged from the service of summons while going to, remaining at, and returning from, the hearing of such application. *Blight v. Fisher*, Peters' C. C. 41, is the only case which we have been able to find holding to the contrary; but this case was expressly overruled by the same court in *Lyell v. Goodwin*, 4 McLean, 29.

The following cases support our proposition: *Miles v. McCullough*, 1 Binney, 77; *Bolton v. Martin*, 1 Dallas, 396; *Hayes v. Shields*, 2 Yeates, 222; *Wetherill v. Seitzinger*, 1 Miles, 237; *Greer v. Youngs*, 17 Ill. App. 106; *Halsey v. Stewart*, 1 Southard, 366; *Huddison v. Prizer*, 9 Phila. 65; *Holmes v. Nelson*, 1 Phila. 217; *Mathews v. Tufts*, 87 N. Y. 568; *In re Healy*, 53 Vermont, 694; *Juneau Bank v. McSpedan*,

5 Bissell, 64; *Anderson v. Rountree*, 1 Pinney (Wis.) 115; *Lamkin v. Starkey*, 7 Hun. 479; *Dungan v. Miller*, 37 N. J. Law, 182; *Seaver v. Robinson*, 3 Duer, 622; *Merril v. George*, 23 Howard Pr. 331; *Cole v. Hawkins*, Andrews, 275; *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *Person v. Grier*, 66 N. Y. 124. 1 Black. Com. 65; Story on Const., sec. 859; Rev. Stats. Ohio, sec. 5457; Sedgwick on Statutory and Const. Law, p. 318.

*Henderson, Kline & Tolles*, for defendant in error.

1. Our claim is, that a proper construction of sections 5021, 5022, 5023, 5024, 5025, 5026, 5027, 5028, 5029 and 5030 of the Revised Statutes, leaves no room for the assertion of the claim of plaintiff's counsel.

2. Even in the absence of the statutes, no such immunity is recognized. Sections 5457 to 5459, Rev. Stats., prescribe particularly the persons privileged from arrest. The weight of authority is against the claim of plaintiff in error. *Blight v. Fisher*, Peters C. C. 41; *Sadler and Love v. Ray*, 5 Rich. (S. C.) 523; *Hunter v. Cleveland*, 1 Brev. (S. C.) 167; *Hopkins v. Coburn*, 1 Wend. 292; *Bours v. Tuckerman*, 7 Johns. 538; *Page v. Randall*, 6 Cal. 32; *Legrand v. Bedinger*, 4 T. B. Monr. (Ky.) 539.

OWEN, C. J. The sole question for our determination is whether a person attending the hearing of an application for an injunction in a case in which he is interested as a party, in a jurisdiction outside of that of his residence, is privileged from the service of summons while going to, remaining at, and returning from, the hearing of such application.

The question is one which profoundly concerns the free and unhampered administration of justice in the courts. That suitors should feel free and safe at all times to attend, within any jurisdiction outside of their own, upon judicial proceedings in which they are concerned, and which require their presence, without incurring the liability of being picked up and held to answer some other adverse judicial proceeding against them, is so far a rule of public policy, that it has received almost universal recognition wherever the common law



is known and administered. *Lyell v. Goodwin*, 4 McLean, 29; *Miles v. McCullough*, 1 Binney, 77; *Bolton v. Martin*, 1 Dallas, 396; *Hayes v. Shields*, 2 Yeates, 222; *Wetherill v. Seitzinger*, 1 Miles, 237; *Greer v. Youngs*, 17 Ill. App. 106; *Halsey v. Stewart*, 1 Southard, 366; *Huddison v. Prizer*, 9 Phila. 65; *Holmes v. Nelson*, 1 Phila. 217; *Matthews v. Tufts*, 87 N. Y. 568; *In re Healey*, 53 Vt. 694; *Juneau Bank v. McSpedan*, 5 Bissell, 64; *Anderson v. Rountree*, 1 Pinney (Wis.) 115; *Lamkin v. Starkey*, 7 Hun. 479; *Dungan v. Miller*, 37 N. J. Law, 182; *Seaver v. Robinson*, 3 Duer, 622; *Merril v. George*, 23 Howard Pr. 331; *Cole v. Hawkins*, Andrews, 275; *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *Person v. Grier*, 66 N. 124.

The contention that the application of this principle should be or is confined to cases where the suitor is served with process while attending upon judicial proceedings without his state, is not supported by sufficient force of reason to justify the distinction. The cases may differ in degree but not in the principle involved.

It is maintained, however, that in this state the subject is regulated, and the question determined, by statute; that sections 5022 to 5030, inclusive, fix the rights of parties litigant as to the jurisdiction within which defendants may be served and required to answer. It is conceded that none of these provisions affect or apply to the case at bar. Section 5031, it is asserted, applies to all other actions of every kind. It provides: "Every other action must be brought in the county in which a defendant resides, or may be summoned, except actions against an executor, administrator, guardian, or trustee," etc.

It is maintained further, that if other evidence were required, that the entire matter of immunity from service of a summons was intended to be covered by statute, it is furnished by those provisions which regulate immunity from civil arrest.

Section 5457 designates particularly all the persons who shall either absolutely, or at certain times, be privileged from arrest, and it includes "all suitors \* \* \* while going to, attending, or returning from court." Section 5458 fixes the

time and places which shall be free from the disturbance liable to follow from an arrest.

Section 5459 provides :

"Nothing in this subdivision contained shall be construed to extend to cases of treason, felony or breach of the peace, or to privilege any person herein specified from being served at any time with a summons or notice to appear ; and all arrests, not contrary to the provisions herein contained, made in any place, or on any river or watercourse within or bounding upon the state, shall be deemed lawful."

Counsel for defendant in error say, concerning the foregoing provision :

"This language, taken in connection with the other sections already alluded to, would seem to admit of no doubt that the legislature fully considered the entire subject and attempted to regulate it ; and in so doing recognized that, while the arrest of a suitor during the progress of his suit and for a reasonable time in going to and returning from it, might subject him to serious interruption, the service of summons in a civil action could have no such effect."

We shall see that this view has not been adopted by the judiciary of our state. In *Compton v. Wilder*, 40 Ohio St. 130, Wilder, a citizen of Pennsylvania, was extradited from that state upon a requisition issued by the governor of Ohio, upon application of Compton, in a criminal prosecution instituted by him in Hamilton county. After Wilder had entered into a recognizance to appear before the court of common pleas at its then next term, and before conviction and before he had an opportunity to return to his home, he was served with both a summons and an order of arrest issued in a civil action brought by Compton against him in Hamilton county. On motion, not only the order of arrest but the summons was set aside. If the position of counsel is well chosen, the summons was improperly set aside. The court held, however, and we think correctly, that both the order and summons were rightfully set aside.

If the contention of counsel is sound, the statutes above cited have provided for those cases where parties are decoyed by

trick and subterfuge from their own into a strange jurisdiction to be then called upon to answer to the suit of some adventurer, for surely the latter of these provisions is broad enough to cover such cases.

We are unanimously of the opinion, however, that the general assembly neither intended nor attempted to comprehend within the purview of these enactments cases where service of summons is procured and made in fraud of the law, or cases like the one at bar (admitted to be free of active fraud), where the tendency is to impede or embarrass the free and complete administration of justice in the courts.

The authorities already cited hold that privilege from the service of summons has existed from time immemorial, and has been upheld by both the federal and state courts. The rule of law announced by them with such unanimity ought not to be considered to have been abrogated by any implication from the language used in section 5459. As the court say in *Anderson v. Rountree*, 1 Pin. (Wis.) 115, *supra*: "It is a principle of common law that privileges are not to be taken away by the general, comprehensive words of a statute; we cannot do by construction what is not clearly authorized by the legislature."

Sedgwick in his work on Statutory and Constitutional Law, page 318, says: "An ancient and settled system ought not to be overturned except by clear, unambiguous, and peremptory language."

In *Matthews v. Tufts*, 87 N. Y., *supra*, the court said: "This immunity does not depend upon statutory provisions."

The court in *Lamkin v. Starkey*, 7 Hun, 479, *supra*, said: "The court has power independently of the statute to protect its officers, suitors and witnesses from molestation by means of process from the court; this special protection is afforded for the sake of public justice."

Our conclusion is that the language, "served at any time with a summons or notice to appear," in section 5459 cited, *supra*, and "may be summoned," etc., in section 5031, *supra*, is to be held to contemplate such a service of summons as, according to the course of proceedings at the common law (where *capias* corresponded in its uses to our summons) is free from

the objection that it is either in active fraud of the law or tends to impede or embarrass the administration of public justice, by deterring suitors from freely attending upon all proceedings which concern them or require their presence. This language contemplates such process and such service as by well-known principles constitute "good service."

The service upon Andrews was in clear violation of this salutary rule, and was properly quashed by the court of common pleas. In reversing this judgment the circuit court erred, and for this error the

*Judgment of the circuit court is reversed.*

### RAILWAY CO. v. IRON CO.

*Pleading, indefiniteness in—Corporations: subscription by one, to capital stock of another—Action by, to recover money voluntarily paid.*

1. Indefiniteness in pleading should be taken advantage of by motion and not by demurrer; so that, where the language of a pleading will fairly admit of a construction that will sustain it as against a demurrer, it should, in the absence of a motion to make definite and certain, be so construed.
2. An incorporated company cannot, unless authorized by statute, subscribe to the capital stock of another; a subscription so made is *ultra vires* and void.
3. The rule, that a payment voluntarily made under a mistake of law, but with a full knowledge of the facts, cannot be recovered back, rests upon general principles of public convenience, and applies to a corporation as well as to a natural person.

(Decided October 16, 1888.)

ERROR to the Circuit Court of Cuyahoga County.

The original suit was brought into the court of common pleas in the county where instituted on appeal from a justice of the peace.

From the petition filed in the common pleas, it appears that The Lake Erie Iron Company, plaintiff, and The Valley Railway Company, defendant, below, are each incorporated companies under the laws of this state; and that the plaintiff

asked to recover of the defendant on an account for goods sold and delivered, the sum of \$253.30. The account consisted of iron and iron forgings, amounting to the sum claimed.

The defendant answered, denying, first, any indebtedness upon the account; and added, as a second defense, and by way of counter-claim,—“that the plaintiff is now and has been for the last twelve years and over, a large manufacturer of such iron goods as are named in the account attached to the petition and of other iron goods used in the construction and the operation of the railroads, and consumes in the manufacturing of such goods daily, a large amount of coal; that said Iron Company is now, and has been for the last ten years and over, largely interested in the matter of reducing the price of coal in the city of Cleveland.

“That the construction of railroads from the said city of Cleveland to the coal fields in said state, south of said city, tends to reduce the price of coal in said city. That the said plaintiff, to bring about and aid in the construction of the railroad of the defendant, from said city to said coal fields, and in order to effect a sale of iron goods by it manufactured, entered into a written contract with the defendant on or about the 1st day of February, 1873, a copy of which contract, marked “Exhibit A,” is hereto attached and made a part of this answer. That in said contract the said plaintiff agreed to manufacture for and deliver to the defendant, iron and forgings of the value of two thousand dollars (\$2,000), and to take in pay therefor forty shares of the capital stock of the defendant at its par value: to the entering into and making said contract by the plaintiff, each and every one of its members and stockholders at the time thereof assented to and requested. That under said contract, and in accordance therewith, the defendant did on or about the 1st day of January, 1881, apply to the plaintiff for the articles described and charged in the account, a copy of which is attached to the petition, and received from the plaintiff, on or about the date last mentioned, said goods under and in pursuance of said contract. That all the provisions of said contract that were to be performed and carried out by the defendant have been by it performed and carried out, ex-

cepting only the delivery by it of the certificate of said forty shares to the plaintiff, which has not been done for the reason that the plaintiff wholly refuses to manufacture for and deliver to the defendant any more iron and forgings. That the defendant is, and has been ever ready to receive, from the plaintiff, iron and forgings in payment for the balance due for said forty shares of stock from the plaintiff, and has so repeatedly notified and duly demanded the same of the plaintiff, but the plaintiff did, prior to, and has ever since the commencement of this action, utterly refused and still refuses to carry out its said contract ;”—and asked judgment for the balance, \$1,746.70, due on the subscription.

The plaintiff demurred to the pleading on the ground that it is insufficient as a defense, or counter-claim. The court sustained the demurrer, to which the defendant excepted; and, proceeding “to take the account, hear the proofs, and assess the damages,” found for the plaintiff in the sum of \$295.04, and rendered judgment accordingly.

The defendant, The Valley Railway Company, prosecuted error to the district court, claiming that the court erred in sustaining the demurrer of the plaintiff to its answer. The judgment was affirmed by the circuit court, and this proceeding is prosecuted to reverse the judgment in both of the lower courts.

The principal questions arising upon the record are (1) whether the facts pleaded in the answer constitute a defense, and (2) whether they constitute a counter-claim in favor of the defendant against the plaintiff.

*W. J. Boardman*, for plaintiff in error.

There is a distinction made between contracts executed, or partly executed, and those that are not either in whole or in part executed. *Field on Corporations*, secs. 259, 260, 263; *Green's Brice's Ultra Vires*, p. 729, *note a*; *Hitchcock v. Galveston*, 96 U. S. 341; *Hays v. G. G. L. & C. Co.*, 29 Ohio St. 330; *Dimpfel v. O. & M. Ry. Co.*, 9 Bissell, 127; *A. U. T. Co. v. U. P. Ry. Co.*, 1 McCray's Rep. 188, syllabus 4; also page 201.

I do not assent to the proposition that one corporation can not take the stock of another corporation.

Suppose the defendant in error had in fact delivered two thousand dollars worth of iron and forgings in pursuance of the contract, and had received a certificate for the forty shares of stock, could it then have repudiated the contract on such grounds? Or suppose it had, as is not unfrequently done by corporations, taken the stock in the name of a trustee, would it not have been liable as the real owner of the stock?

*Henderson, Kline & Tolles*, for defendant in error.

We contend that the contract set forth in the answer is one which neither the plaintiff or defendant had power to make.

*First*—The railway company was not authorized to accept subscriptions to its capital stock payable otherwise than in money. The rule which prevails in this state for the determination of corporate powers, is that corporations have those powers, and only those, which are expressly granted to them, or are necessary or incident to the exercise of those expressly granted.

*Strauss v. Insurance Co.*, 5 Ohio St. 59; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350; *Coppin v. Greenless & Ransom Co.*, 38 Ohio St. 275.

The same rule prevails in England and most of the United States. *Ashbury Railway Carriage and Iron Co. v. Richie*, 7 L. R. Eng. & Irish Appeal Cases, 653; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258; *Thomas v. R. R. Co.*, 101 U. S. 71; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Franklin Co. v. Bank*, 68 Me. 43; Revised Statutes of Ohio, sections 3242, 3243, 3244, 3245 and 3282. *Sims v. R. R. Co.*, 37 Ohio St. 556.

*Second*—Whether the contract was *ultra vires* as to plaintiff in error or not is of little consequence, if, as seems to us clear, the Lake Erie Iron Company had no authority to subscribe to the capital stock of any other corporation.

In determining this question, it should be noted that things necessary or incident to the purpose of corporate existence do not include things merely advantageous or convenient. *Davis v. Old Colony R. R.*, *supra*; *Thomas v. R. R. Co.*, *supra*.

---

Railway Co. v. Iron Co.

---

The rule is laid down, that a corporation organized for one purpose has no power to subscribe for the stock of a company organized for another, in *Mechanics Savings Bank and Building Association v. Meridian Agency Company*, 24 Conn. 159; *Franklin Company v. Savings Bank*, 68 Me. 43; *Railroad Company v. Collins et al.*, 40 Ga. 582; *Hazelhurst v. Railroad Company*, 43 Ga. 13; *Berry v. Yates*, 24 Barb. 199; *Railroad Co. v. Railroad Co.*, 31 N. J. Eq. 475; *Talmage v. Pell*, 3 Selden (N. Y.) 328; *Milbank v. Railroad Co.*, 64 How. Pr. 20. *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350; *Coppin v. Greenlees*, 38 Ohio St. 275.

Everyone dealing with a corporation, is bound to know, at least, its apparent powers. *Davis v. Ry. Co.*, *supra*; *N. T. Co. v. Miller*, 33 N. J. Eq. 155; *Franklin Co. v. Bank*, *supra*; *Towsley v. Moore*, 30 Ohio St. 184.

The contract being *ultra vires*, it is entirely immaterial whether any or all the stockholders assented to or attempted to ratify it or not. *Ashbury Co. v. Richie*, *supra*; *Davis v. Ry. Co.*, *supra*; *Thomas v. Ry. Co.*, *supra*; *Nat. Trust Co. v. Miller*, *supra*; Chitty on Cont., p. 553; *Towsley v. Moore*, *supra*.

MINSHALL, J. A question arises *in limine* as to the proper construction of the pleading demurred to, the answer and cross-petition of the defendant below. It is claimed that there is no averment that the goods were delivered by the plaintiff as in performance of the contract of subscription to the capital stock of the defendant. The averment is, that under said contract the defendant "applied" for the goods charged in the account sued on, "and received from the plaintiff said goods under and in performance of said contract." This must, as we think, be held to mean that they were delivered by the plaintiff as claimed by the defendant. They could not otherwise have been received from the plaintiff in pursuance of the contract. The most that can be claimed as to the averment is, that it is indefinite. If so, then it should have been raised by motion and not by demurrer. *The Trustees of School Section 16 v. Odlin*, 8 Ohio St. 293, 297.



If, then, the subscription of the Iron Company to the capital stock of the Railway Company is a valid one, the plaintiff, on the averments of the answer, has no right to recover, unless upon the facts stated, it has the right to sue as for goods sold and delivered, and recover as for goods that had been delivered upon a contract it had no power as a company to make. So that the determination of the questions, (1) whether the plaintiff below could make a valid subscription to the capital stock of the Railway Company, and, if not, (2) whether it could recover back what it had delivered in performance thereof, will dispose of the right of the plaintiff to recover for the goods claimed to have been sold and delivered, and, of the claim of the defendant to recover the balance alleged to be due upon the subscription.

We think it well settled as a result of the decisions in this state, as well as elsewhere, that an incorporated company cannot, unless authorized by statute, make a valid subscription to the capital stock of another; that such subscription is *ultra vires* and void. Mr. Morawitz, in stating this to be the law, observes: "The right of forming a corporation is conferred by the incorporation laws only upon persons acting individually, and not upon associations; moreover, it would, under ordinary circumstances, be a violation of the charter of an existing company to subscribe for shares in a new company and assume the resulting liabilities." (Priv. Corp. § 433.)

There has been no direct decision upon the question by this court, but such has been the uniform holding elsewhere. *Railroad Company v. Railroad Company*, 31 N. J. Eq. 475; *Franklin Co. v. Lewiston Savings Bank*, 68 Maine, 43; *Railroad Company v. Collins*, 48 Ga. 582. These cases all proceed upon the principle that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer, or that may fairly be implied therefrom. This doctrine was clearly announced and applied in *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59, and has been firmly adhered to in this court. *Railroad Co. v. Hinsdale*, 45 Ohio St. 556, 573.

No claim is made by the defendant that the Iron Company had any express statutory authority to use its capital or assets in aid of the construction of a railroad by subscription to its capital stock or otherwise. The only averment, as to this, is, that it, the Iron Company, conceived that it would be benefited by the reduction of the price of coal at Cleveland, its place of business, and the market which the construction of the road would afford for its manufactures, and by these considerations was induced to make the subscription. But all this can be of no avail in the face, at least, of the prohibition contained in § 3266 of the Revised Statutes, that, "No corporation shall employ its stock, means, assets or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its creation." There was then, as we think, no authority whatever in the Iron Company to make a valid subscription to the capital stock of the Railway Company, and no recovery can be had upon it.

2. The next question then is, whether the plaintiff, the Iron Company, can recover the value of the goods delivered by it in part performance of the contract on which the subscription was made? We shall treat the question as if the action had been in plain terms for such a recovery, without embarrassing it with a doubt as to whether such a recovery could be had in the form of a suit for goods sold and delivered.

It is quite certain that the simple fact that the plaintiff was under no legal obligation to deliver the goods, the contract of subscription being void, is no ground for a recovery of their value against the defendant, although the plaintiff may have been ignorant of the law affecting the contract. Bish. Cont. § 615 and § 81. To warrant a recovery in such case, it must further appear that the delivery was made in ignorance of the facts, or else that it was an involuntary one. *Clark v. Dutcher*, 9 Cowan, 674, 684; *Lamborn v. County Commissioners*, 97 U. S. 181; *Babcock v. Fond du Lac*, 58 Wis. 230; *Savings Institution v. Linder*, 74 Pa. St. 371; *Inhabitants of Livermore v. Inhabitants of Peru*, 55 Maine, 469; Bish. Cont. § 631; Pol. Cont. 409, and notes. But there is no ground for either of these claims. The delivery was a voluntary one, with full

knowledge of the facts, which forbids a recovery of the value of the goods so delivered, unless some reason exists why corporations should be assisted against the consequences of their voluntary acts, in cases where private persons would not.

The fact that corporations are generally not liable for the unauthorized acts of their agents, and may repudiate the same, does not seem to furnish a solution of this question. The principle which denies a recovery in this class of cases will be found to rest upon considerations of general convenience, to which corporations as well as natural persons are required to conform. Remedial justice is established to aid those who cannot aid themselves without the use of violence, in obtaining what as a matter of right is their due. It does not invite litigation, and declines its assistance to those who voluntarily place themselves in the situation of becoming suitors. The Iron Company was at liberty by its agents to accede to the demand of the railroad company for the delivery of the goods on the subscription, or to decline to do so. It chose, with a full knowledge of the facts, to deliver the goods; and there is no sound reason why it should be aided in a law-suit made necessary by its own voluntary act, that would not apply with equal force to a natural person. Where there is no ignorance of the facts, or coercion, it is said, in *Glass Co. v. City of Boston*, 4 Met. 181: "If the party would resist an unjust demand, he must do so at the threshold. The parties treat with each other upon equal terms, and if litigation is intended by the party of whom the money is demanded, it should precede payment. If it were not so, the effect would be to leave the party who pays the money, the privilege of selecting his own time and convenience for litigation; delaying it, as the case may be, until the evidence, which the other party would have relied upon to sustain his claim, may be lost by lapse of time and the various casualties to which human affairs are exposed." In some cases stress is laid upon the inconvenience it would be to the other party, who may receive the money as his own, and, acting upon that belief, so dispose of it as to make it exceedingly inconvenient, if not impossible, to repay it. *Brisbane v. Dacres*, 5 Taunt. 144, Gibbs J. 152; *Clark v. Dutcher*, 9

---

 Seville v. Wagner.
 

---

Cowan, 674, 684. In any view, however, the reason of the rule applies with like force to a corporation as to a natural person.

*Judgment reversed and cause remanded to the court of common pleas, with direction to overrule the demurrer to the answer of the defendant, and for further proceedings.*

---

44	52
50	558

---

 SEVILLE v. WAGNER.
 

---

*Attachment proceedings before justices of the peace—When may be reviewed on error.*

1. An order of a justice of the peace discharging or refusing to discharge an attachment, may be reviewed by petition in error in the court of common pleas, and for that purpose a bill of exceptions may be taken, embodying all the evidence upon the hearing of the motion to discharge, together with the ruling of the justice, and the exceptions thereto.
2. Where the weight of the evidence is the only question presented by such bill of exceptions, this court will not enter upon its review, or disturb the judgment of the court below thereon; but when the party against whom an order of attachment is obtained, in support of his motion to discharge the same, by his affidavit denies the ground of the attachment stated in the affidavit therefor, it devolves upon the party procuring the attachment, to establish such ground by proper evidence; and whether there is any evidence tending to sustain it, is a question of law, which the parties may have determined by this court.

(Decided October 16, 1888.)

### ERROR to the District Court of Cuyahoga County.

On the 8th day of February, 1883, Philip Wagner commenced an action against Joseph Seville, before a justice of the peace, on an account for goods sold and delivered, and obtained therein an order of attachment, which the defendant, upon due notice and before the trial, moved to discharge; and in support of the motion, filed his affidavit denying the charge made in the plaintiff's affidavit, on which the attachment was procured. The motion was heard upon testimony, and overruled, and a bill of exceptions embodying all the evidence, the ruling of the justice, and the defendant's exceptions, was taken and entered of record. Judgment having been rendered in favor of the

plaintiff for the amount of his claim, and directing the application of the attached property to its payment, the defendant filed his petition in error in the court of common pleas, and obtained a reversal of the order of the justice refusing to discharge the attachment. The judgment of the common pleas was reversed by the district court, and this proceeding in error is now prosecuted to reverse the district court.

*George A. Groot*, for plaintiff in error.

If the common pleas has power, under the statute, to review attachment proceedings upon error from a justice of the peace upon the evidence, then the action of the district court is erroneous, and should be reversed.

Counsel for the defendant in error relies upon the decision of the supreme court made in the case of *Baer, Horkeimer & Co. v. Otto*, 34 Ohio St. 11.

Since the decision of the court in that case, the legislature has come to the relief of those who are unfortunate enough to be dragged into a justice court upon attachment proceedings, and has provided a remedy against the great abuse of power lodged in the hands of justices in respect to such cases. Sections 6522-6525 Revised Statutes, 1880.

If attachment proceedings could be reviewed on error from the common pleas under the code before the revision, such proceedings are certainly reviewable on error from a justice court under the statutes, as they now exist. Section 6524 specifically authorizes a bill of exceptions to be prepared, signed and sealed, to reverse, vacate or modify an order of attachment made by a justice of the peace, and any party to a suit affected by an order made by a justice in discharging or refusing to discharge an order of attachment, *shall have the right to file in the common pleas court a petition in error to reverse, vacate or modify the same.*

How is the court to modify an order in such proceedings, or any proceedings, unless it has the facts before it for that purpose?

The decision of this court, in *Young v. Gerdes*, 42 Ohio St. 102, is confirmatory of my position, and it substantially decides the real question made in this case.

*Wilson & Sykora*, for defendant in error.

We concede that the common pleas may look at the bill of exceptions and say there is no evidence whatever. That is a question of law. They cannot reverse on a question of the weight of the evidence before a justice. *Baer v. Otto*, 34 Ohio St. 11.

An order of the justice of the peace, made on a motion to discharge an order of attachment, cannot be reviewed on proceedings in error, where the error alleged is *that the order was against the weight of the evidence*.

Section 6524 does not militate against the argument. That section must be construed in harmony with section 594, subdivision 8. So construed in harmony it will read that a bill of exceptions *on a question of law* may be signed for that purpose. Any other construction will render the two statutes inharmonious, overrule the 34 Ohio St. and lead to the absurdity of making a poor oppressed justice of the peace record the evidence without any law to warrant him in taxing costs therefor. *State ex rel. v. Franklin Co.*, 20 Ohio St. 421, 424.

Statutes *in pari materia* should be so construed as to give effect to all their provisions, and if they can be construed so as to stand well together, there is no repeal by implication. *Hirn v. State*, 1 Ohio St. 15, 20; *More v. Given*, 39 Ohio St. 661.

WILLIAMS, J. The ground for the attachment, as stated in the affidavit on which it was procured, is, that "the defendant has property or rights in action which he conceals." This charge having been denied by the affidavit of the defendant, it devolved upon the plaintiff to sustain it by proper evidence. Without such evidence, it was the duty of the justice to discharge the attachment; and his order refusing to discharge it, was reviewable by petition in error, in the court of common pleas. Such proceeding is specifically authorized by section

6524 of the Revised Statutes, which provides that "any party to a suit, affected by an order discharging or refusing to discharge an order of attachment, shall be entitled to file a petition in error in the court of common pleas to reverse, vacate, or modify the same, and, when necessary, a bill of exceptions may be taken and signed for this purpose." It is, however, contended, that a bill of exceptions can only be taken to the opinion of the justice upon some question of law, and that there is no authority for embodying in the bill, the evidence heard by the justice, for the purpose of reviewing his decision upon it. *Baer v. Otto*, 34 Ohio St. 11, is relied on in support of this claim. It was said in that case, "that there is no provision made by legislation, as it now stands, for preserving the evidence offered on such motion, or for reviewing the decision of the justice, upon the ground that such order, either in granting or refusing the motion, is contrary to the evidence."

When that case was decided, the only statute providing for bills of exceptions in proceedings before justices of the peace, was the act of February 11, 1869 (66 Ohio L. 7), under which, the extent of the right of the party, was "to except to the opinion of the justice upon any question of law arising during the trial of the cause," and, of the duty of the justice, "to sign and seal a bill containing such exceptions, if truly alleged, with the point decided." Since that decision, section 6524 has been made part of the justice's code, and affords ample authority for taking bills of exceptions to the orders of justices discharging or refusing to discharge orders of attachment. The section contains no such limitation as that contended for, but is broad enough to allow any questions to be raised by bills of exceptions taken under its provisions, that may properly be presented by a bill of exceptions. If the question thus presented is simply one of the weight of the evidence, this court will not enter upon its review, or disturb the judgment of the court below. But, whether there was any evidence tending to sustain the charge made in the affidavit for the attachment, is a question of law, which the plaintiff in error is entitled to have determined by this court. It is only with this view, that we have examined the bill of exceptions

---

Garver v. Tisinger.

---

before us, and from such examination we conclude there was no evidence of that character.

The court of common pleas therefore rightly reversed the order of the justice of the peace, and dismissed the attachment, and in reversing that judgment, the district court erred.

*Judgment of the district court reversed, and that of the common pleas affirmed.*

---

GARVER v. TISINGER.

*Assignment for benefit of creditors—Jurisdiction of probate court in—Reconveyance by assignee to assignor—Liability of sureties on assignee's bond.*

1. Where one makes a voluntary assignment under the statute, in trust for the benefit of creditors, it is within the jurisdiction of the probate court, at the request of the creditors, the assignor, and the assignee, to terminate the trust, and require the assignee to re-convey the property left in his hands to the assignor, for the purpose of enabling the latter to effect an adjustment with his creditors.
2. Where by the decree of the probate court upon the final account of the assignee, he is ordered to pay over a balance remaining in his hands to the assignor, who thereupon assigns the same to a creditor in satisfaction of his claim, the sureties on the assignee's bond will be liable for his default of payment; and, in an action by the creditor against the sureties to recover the balance so assigned to him, the sureties will be concluded by the decree, although in executing the assignment, there may have been collusion between the assignor and assignee to defraud the creditors, unless an appeal has been taken, or the judgment has been reversed upon a proceeding in error.
3. Upon a proceeding to vacate the trust, and procure a re-conveyance to the assignor of the property assigned, the probate court will not, in rendering a decree that the assignee file his final report and that the trust be ended by complying with the terms of the decree, lose its jurisdiction over the person of the assignee for the settlement of his final account; nor will the sureties on his bond, by such a termination of the trust, be released from liability for the assignee's failure to pay over, when ordered by the court, a balance found remaining in his hands.

(Decided October 16, 1888.)

ERROR to the Circuit Court of Butler County.

The original action was commenced in the Court of Common Pleas of Butler County, by Joseph Garver, Thomas Millikin and

46	56
51	482
46	56
68	255



Samuel McAnderson, the plaintiffs in error, against Isaac M. Warwick, principal, and N. E. Warwick, W. S. Warwick, G. W. Shuler, S. L. Beeler, Peter Tisinger and John McMeen, sureties on the bond of Isaac M. Warwick, assignee of Daniel Shafer, the defendants in error. Being unable to meet his liabilities, Daniel Shafer, on the 23rd day of July, 1879, made a deed of assignment to Isaac M. Warwick of all his property, except what was exempt by law, in trust for the equal benefit of all his creditors. The assignee duly filed on that day the deed of assignment in the Probate Court of Butler County, accepted the trust, and then and there gave bond, payable to the State of Ohio, in the sum of \$20,000, with N. E. Warwick and the other defendants in error as sureties, conditioned as required by law. The bond was duly accepted by the probate judge, and Isaac M. Warwick entered upon the discharge of his duties as trustee, and as assignee and trustee took charge of the real and personal estate assigned to him. In November, 1879, a paper, of which the following is a copy, signed by the creditors of Daniel Shafer, and attested by N. E. Warwick, one of the sureties, was addressed to, and delivered to Isaac M. Warwick, the assignee, viz: "The undersigned creditors of Daniel Shafer, insolvent, having withdrawn our respective claims from the assignee and concluded to settle the same with said Daniel Shafer, hereby consent that the said assignee of Daniel Shafer may, under the order of the Probate Court of Butler County, Ohio, surrender his trust, put an end to the assignment, and re-convey to said Daniel Shafer the residue of the property assigned to him, and that he may be discharged (so far as we are concerned), from all liability as said assignee."

Upon proceedings thereafter instituted in the probate court to vacate the trust, the court, on December 2, 1879, found that Daniel Shafer had either paid or otherwise arranged all debts, and that his creditors had petitioned to put an end to the assignment, and to have re-conveyed by the assignee to Daniel Shafer all the real and personal property that was left. The probate court decreed, that Isaac M. Warwick as assignee file his final report and settlement, and that the

trust be ended, and that after paying costs and expenses and any preferred debts he may have paid, he reconvey to Daniel Shafer whatever real and personal estate was so assigned to him; all which was so done with the consent of Isaac M. Warwick.

In pursuance of such decree, Isaac M. Warwick, as assignee, filed his final report and account in the probate court, and the same was (upon exceptions filed by said Daniel Shafer) finally heard and determined on February 17, 1880. The probate court found that there was then remaining in the hands of the assignee a balance of \$909.05, which sum was found to be assets of Shafer, and the assignee was ordered to pay over the same to him.

In accordance with the decree of the probate court, the assignee re-conveyed to Shafer all the assigned property except the balance of \$909.05, which he refused to pay when demanded. That balance, Shafer assigned to the plaintiffs, in payment of debts owing by him to them, and they became the joint and equal owners of the same. Upon refusal by Isaac M. Warwick to pay such balance, with interest, to the plaintiffs, they commenced their action for the recovery of the same; and the court of common pleas thereupon rendered judgment for the sum of \$1,167, against Isaac M. Warwick, as principal, and N. E. Warwick, W. S. Warwick, G. W. Shuler, S. L. Beeler, Peter Tisinger and John McMeen as his sureties. On petition in error by the defendants, the circuit court reversed this judgment, and remanded the cause for further proceedings, on the sole ground, that the court of common pleas erred in sustaining the demurrers of the plaintiffs to the second, third, and fourth defenses in the separate answer of the sureties, and also sustaining the demurrers of the plaintiffs to each of the defenses in the separate answer of Isaac M. Warwick. To reverse the judgment of the circuit court this proceeding is instituted.

The *second defense of the sureties* sets up, in substance, that before the assignment, Daniel Shafer owed a large amount of debts, and that he and Isaac M. Warwick confederated and conspired together, to defraud Shafer's creditors out of their

just claims and demands; and that the deed of assignment from Shafer to Isaac M. Warwick was a scheme or contrivance resorted to, in order to consummate the fraudulent arrangement.

*Third defense of sureties.*—The plaintiffs signed and delivered to Daniel Shafer a written release directed to Isaac M. Warwick, assignee, releasing the assignee from payment of each of their claims, agreeing that he might be discharged from liability as assignee, and that they would look to Daniel Shafer for payment of their then existing claims; and thereupon, plaintiffs, on November 24, 1879, delivered to Shafer a paper, which enabled Shafer to file his petition to put an end to the assignment, alleging that he had satisfied the claims of the plaintiffs, and asking to put an end to the assignment; and thereupon the probate court put an end to the assignment; that the claim of \$909.05 was assigned to the plaintiffs to pay the same debt they had against Shafer, in regard to which, they agreed to release the assignee; that the order of discharge was made December 2, 1879, when the money, \$909.05, was in the assignee's hands, without first procuring the payment over of such sum; and that the effect of thus putting an end to the trust was to discharge the bond signed by the sureties.

*Fourth defense of sureties.*—That since December 2, 1879, when Isaac M. Warwick was discharged by the probate court as assignee, there has been no successor appointed by the court to take Isaac M. Warwick's position and receive the money; and besides, there are other creditors of Daniel Shafer not paid in full, and who are entitled to a *pro rata* share of the \$909.05, and four years had not elapsed, within which creditors who have been fraudulently settled with would have a right to receive from Isaac M. Warwick the \$909.05.

The defenses set up in the separate answer of Isaac M. Warwick contain nothing—essential to be considered—different from the second, third and fourth defenses of the sureties.

*Thomas Millikin and Isaac Robertson, for plaintiffs in error.*  
*N. E. Warwick, for defendants in error.*

DICKMAN, J. The record discloses that the creditors of Daniel Shafer, assignor, having withdrawn their claims from the assignee, and concluded to settle the same with Daniel Shafer himself, gave their consent by a writing addressed to the assignee, that he might, under the order of the probate court, surrender his trust, terminate the assignment, re-convey to Daniel Shafer the residue of the assigned property, and be discharged from all liability as assignee. The probate court, upon petition filed by the assignor, found that he had either caused to be paid or had otherwise arranged all his debts, and had produced satisfactory evidence, that all his creditors had petitioned to vacate and put an end to the assignment, and to have the assignee re-convey to the assignor the residue of the property in his hands as assignee. It was thereupon ordered by the probate court, that the assignee file his final report and settlement; that he reconvey to Daniel Shafer whatever real or personal estate might remain in his hands as assignee; that nothing in the decree should prevent the assignee re-conveying the real estate, personal property, and any portion of the money and other effects he might deem proper before his final report and settlement; and that the trust be ended by complying with the terms of the decree. The assignee settled his final account; and it was ordered, that a balance found remaining in his hands be paid over to the assignor. From this order there was no appeal, and there was no proceeding in error to reverse it.

The court did not transcend its jurisdiction in directing the re-conveyance to the assignor, and the discharge of the assignee.

The assignee, the debtor, and the creditors were the only persons who had the beneficial interest in the assigned property, and the power of disposal over it. They concurred in invoking the action of the court, and it is not alleged, nor was there any fraud in obtaining the decree of the court. An insolvent, to secure equality and prevent a race of diligence among his creditors, may assign his property, but, after the assignment, the creditors may, as frequently occurs, be convinced that the insolvent can realize more from his assets than an assignee, and may therefore desire to re-invest him with the as-

signed property. That the assignment in such case should be canceled, with the consent of creditors, or at their instance, would be just and proper. Thus in *Small v. Sproat*, 3 Metc. 303, an insolvent debtor made an assignment under the statute, of all his property, which was insufficient to satisfy the debts of his creditors, and the assignees, with the consent of all those creditors, were permitted to re-convey the property to the assignor for the purpose of enabling him to make an adjustment with them.

It is for the assignee to guard the rights of creditors, and also of the assignor; and while in compliance with the order of the court, it is incumbent upon him to reconvey all the assigned property to the assignor, that he himself may adjust the claims of his creditors it is also incumbent upon him, if in administering the trust he has paid all the assignor's debts, to turn over to him any surplus that may then remain in his possession, or under his control. In such cases, there necessarily arises a resulting trust by mere operation of law, in favor of the debtor, which will entitle him to claim the surplus of the assignee. *Brashear v. West*, 7 Pet. 608; *Halsey v. Whitney*, 4 Mason, 206, 222, 223. And under section 6356 of the Revised Statutes, whenever, on settlement, the same shows a balance remaining in the hands of the assignee or trustee, it is to be divided *pro rata* among the creditors until they are paid in full, and the remainder, if any, is to be refunded to the assignor or his legal representatives.

But it is alleged substantially in the second defense of the sureties, that there was a fraudulent arrangement between Isaac M. Warwick, the assignee, and Daniel Shafer, the assignor, to defraud creditors; and that, therefore, they are discharged from liability on their bond, for the failure of the assignee to pay over to the assignor the balance of \$909.05, as ordered by the court, and which balance Daniel Shafer had assigned to the plaintiffs, for value received, for the purpose of paying debts which he owed them. It is not claimed that the decree of the probate court is open to impeachment for fraud or mistake. Full knowledge of the proposed reconveyance and surrender of the trust was brought home to one of the sureties, N. E. War-

wick, at the earliest stage, as evidenced by his attestation of the writing signed by the creditors, and directed to the assignee. The order of the court for the payment over of the balance held by the assignee, was made after a hearing upon exceptions to the assignee's final account; the sureties had ample time and opportunity to resist the order; and under the statute—Revised Statutes, section 6407—an appeal may be taken to the court of common pleas, from any order of the probate court in settling the accounts of assignees, by any person against whom such order may be made, or who may be affected thereby. The sureties not having appealed or instituted proceedings in error, they, as well as their principal, are concluded by the decree of the probate court.

The principle, that a surety upon a guardian's or administrator's bond is concluded by a settlement in the probate court of his principal's accounts, may by parity of reason be applied to a surety upon the bond of an assignee. In *Braiden v. Mercer*, 44 Ohio St. 339, it was held, that in an action upon a guardian's bond for the recovery of the amount found due the wards upon a final settlement of the guardian's accounts in the probate court, the sureties are concluded by the settlement, and will not be heard, in the absence of fraud and collusion, to question its correctness, or to demand a re-hearing of the accounts. The sureties are presumed to contract with reference to the jurisdiction and action of the court to which the principal may be answerable, and are bound by the judgment against them.

In *Casoni v. Jerome*, 58 N. Y. 321, the court say, "The question whether the plaintiff's demand was a debt against the estate, was necessarily determined by the surrogate on the accounting, and so long as the decree stands unreversed, it cannot be questioned in a collateral action either by the administratrix or her sureties. Sureties are bound by the decree of the surrogate in such a case, because by their conduct they have made themselves privy to the proceedings against their principal, and when the principal is concluded, the surety, in the absence of fraud and collusion, is concluded."

In *Little v. Commonwealth*, 48 Penn. St. 337, when by the final decree upon the account of an assignee for the benefit of creditors, he is directed to pay the claim of a specific creditor, it was held that his sureties were liable for default of payment, and could not defend on the ground that they were not bound by the decree; that the duty of the assignee was fixed by a competent tribunal whose judgment could not be tested collaterally by the bail; that the remedy of the sureties, if any, was by an appeal from the decree of distribution; but that, where no appeal is entered, they are bound by the decree, and cannot, in an action on the bond, set up that it was erroneously made against the assignee.

And in *Commonwealth v. Steacy* (Supreme Court of Pennsylvania, Oct. 2, 1882), "The Reporter" vol. 14, p. 667, the rule is stated, that the bond of an assignee for the benefit of creditors, is for the benefit of any one interested in the assigned estate, and a decree of distribution is conclusive as to the fact that the persons to whom awards are made are so interested; that the only remedy against an erroneous award is by appeal, and in an action upon the bond to recover the amount of an award, neither the assignee nor his sureties can set up as a defense that the award to the plaintiffs was erroneous. See, also, *Kelley v. West*, 80 N. Y. 139; *Harrison v. Clark*, 87 N. Y. 572; *Johnston v. Smith*, 25 Hun, 171.

It is contended, that if there was a scheme between Daniel Shafer and his assignee to defraud creditors, he could not under such a contract, illegal and immoral as it would be, maintain an action against the assignee or his sureties, to recover the balance ordered to be paid over by the probate court; and that the same bar to an action would extend to the plaintiffs, who were creditors at and from the date of the assignment. Should it be conceded that the relations between the primary parties—assignor and assignee—out of which the agreement of the sureties arose, were contaminated by fraud, it is manifest that the sureties were not induced to become such by any false representations as to material facts, or by any other fraud perpetrated on them by the creditors. The sureties in their separate answer and defenses, do not charge that the creditors, or

any of them, have been parties to any fraudulent transaction ; and the allegation, that Daniel Shafer and Isaac M. Warwick entered into a conspiracy, and had a secret understanding with each other to defraud creditors, should not deprive the creditors of recourse to the sureties for indemnity.

When the order of payment was made by the probate court, the plaintiffs were unpaid creditors of Daniel Shafer, and the balance in the assignee's hands, if properly applied, would have inured to the benefit of the plaintiffs as creditors. The order was, in fact, in the interest of the creditors who had withdrawn their respective claims from the assignee, but who had not yet been satisfied. If there was a secret arrangement between Daniel Shafer and his assignee, of such a character as to furnish the sureties an available defense in an action against them by the assignor, they would stand in a very different attitude in an action by innocent creditors. In the one case, they might be exempt from liability, while in the other they would be bound for the delinquency of their principal. When the bond is given with sureties in an amount fixed by the court, the creditors look to it as securing the fund that may arise from the sale of property ; and if there is a misapplication of such fund by the assignee, or a fraudulent collusion between him and the assignor, the creditors may have recourse to the sureties as an especial protection designed for them in such emergencies.

It is furthermore urged in behalf of the sureties, that the balance of \$909.05, was assigned to the plaintiffs to pay the identical claim they had against Daniel Shafer at the date of his assignment ; that through the action of the plaintiffs and other creditors, the court by its decree of December 2, 1879, put an end to the trust ; and that, although the assignee then had such balance in his hands, he was not ordered to pay it over until the hearing upon his final account, on February 17, 1880, of all which, the legal effect was, to discharge the bond signed by the sureties. The order of the court was " that said trust be and the same is ended by complying with the terms of this decree," which terms required that the assignee file his final report and settlement. Until he had



settled his account, and obeyed the order of the court in reference to the same, he would remain charged with the obligations of the trust. But this court has determined that, in cases which are somewhat analogous to the one under consideration, the surety is not released from liability by an acceptance of the resignation of his principal before the settlement of his accounts.

In *Slagle v. Entrekin*, 44 Ohio St. 637, the court held, that by accepting the resignation of an administrator pending the settlement of his accounts, the probate court does not thereby lose its jurisdiction over his person, or the settlement of his accounts, and may proceed to hear and determine exceptions thereto and ascertain the amount due from him to the estate, in like manner, as if he had continued in the execution of his trust; and the amount so found due will, in the absence of fraud and collusion, be conclusive, not only upon him, but upon his sureties, in an action upon the administration bond, unless an appeal has been taken, or the judgment has been reversed upon a proceeding in error. See also *Casoni v. Jerome*, *supra*. The bond of the assignee was given pursuant to the statute, was intended for his good behavior as trustee under the assignment, and it is right that his sureties should be held for his neglect to pay over funds coming into his hands during the continuance of his trust, although the amount thereof may not have been determined until his final report filed after an order of the court providing for a determination of the trust.

As a further defense by the sureties, it was alleged, that from the 2d day of December, 1879—when, they say, the trust was ended—there had been no successor appointed to whom the assignee could legally pay over the money remaining in his hands at that time; that at that time, there were other creditors of Daniel Shafer besides the plaintiffs not paid in full, and entitled to a *pro rata* share of the balance of \$909.05; and that four years had not elapsed since that time, within which such creditors who had been fraudulently settled with, would have a right to have a trustee appointed by the court,

---

West v. Weyer.

---

who would be the assignee's successor, and alone authorized to receive and receipt for such balance. This defense of the sureties should not avail. It will readily occur upon examination of the record, that no creditors complain of any fraud upon their rights. They asked, not for the appointment of a successor to the assignee in the administration of the trust, but that the trust might be ended; and, in accordance with their request, the trust was terminated, and the balance remaining in the hands of the assignee ordered to be paid over to Daniel Shafer.

We find nothing in the separate answer of Isaac M. Warwick—in which he acknowledges and explicitly sets forth his own fraudulent motives and conduct as assignee—that requires any further consideration than what we have already given to the defenses of the sureties contained in their separate answer. It is our opinion, therefore, that the judgment of the circuit court should be reversed, and the judgment of the court of common pleas affirmed.

*Judgment accordingly.*

---

WEST v. WEYER.

*Rents and profits—When tenant in common liable for—When not liable for interest—  
Section 5774, Revised Statutes, construed.*

1. By virtue of section 5774 (Revised Statutes), which provides that one tenant in common may recover from another his share of rents and profits received by such tenant in common from the estate, "according to the justice and equity of the case," a tenant in common who uses the common estate simply to pasture his cattle, is liable to account to his co-tenants for their share of the value of such use as for rents and profits received.
2. Where no demand has been made upon such tenant in common, either for the possession of the premises or for the value of their use, before the commencement of the action, he is not liable to account for interest upon the amount found due his co-tenants for such use.

(Decided November 13, 1888.)

**ERROR** to the Circuit Court of Highland County.

The suit below was tried on appeal in the circuit court. It was originally brought for partition of real estate, and for an account of the rents and profits received by the defendant below, Allen P. West, a tenant in common in possession of the lands. The trial court found and stated the following facts and conclusions of law :

That the plaintiff and defendants, mentioned in the pleadings as co-tenants with them, are the heirs-at-law and tenants in common of said real estate in the several proportions set forth in the pleadings ; that there were no improvements upon the land excepting the outside fences, and that it contained about 146 acres, of which about 100 acres were in pasture and the rest in woods ; that the defendant, Allen P. West, owned the land adjoining and surrounding it upon three sides, and that there was no fence between his land and that mentioned in the petition ; that the defendant, Allen P. West, pastured upon his own land adjoining this, containing about 400 acres, about 100 head of cattle each year, and that they had access to and pastured upon the land described in the petition, and that during different years of the time that he was in possession he fed the cattle on the woodland of the premises described in the petition ; that he had ample pasture each year for his own use without using this land, and that he could not have used his own pasture without the cattle going upon this land unless he had erected a partition fence between his own land and that in question ; that West did not cultivate or crop the premises, or receive any rent therefor from others, or make any use of the same as aforesaid ; that Allen P. West did not occupy the premises adversely to any of his co-tenants, nor did he exclude any of them from the possession thereof, nor did he occupy the same under any lease from or contract with any of them to pay rent therefor ; nor did any of his co-tenants ask or demand possession of the premises or any share of the rents and profits thereof prior to the beginning of this suit ; that the fair rental value of the premises was \$150, and that the value of West's use and occupation thereof was \$150 per year ; that he occupied the premises one year after the bringing of this suit under the same circumstances as before ; and

---

West v. Weyer.

---

that he paid the taxes on the premises before said suit was brought at the rate of \$35 per year.

And from the foregoing finding of facts, the court, as its conclusions of law, finds that the defendant, Allen P. West, is liable, and should account to the other tenants in common in the proportion of their respective shares thereof for his use and occupation of the real estate in the petition described for the full period of six years prior to the beginning of this suit, at the yearly value of \$150 as aforesaid, with interest on the said annual installments of rent to this date, and for the year after the beginning of this suit at the same rate with interest to this date, and he is entitled to credit upon his several payments of taxes made before the commencement of this suit, with interest on each payment to this date; the balance being \$986 09.

Judgment was rendered accordingly, which this proceeding is brought to reverse.

*Steel & Hough*, for plaintiff in error.

I. We claim that section 5774, Rev. Stats., does not authorize a recovery against a tenant in common, only, when he has *received* rents and profits more than comes to his share; and not for mere use and occupation. There is a wide and well recognized difference between *receiving* rents and profits, and *use and occupation*. Freeman on Co-tenancy and Par., § 270, 274; 1 Wash. Real Prop. pp. 695-6; *Peck v. Carpenter*, 7 Gray, 283; *Woolever v. Knapp*, 18 Barb. 265; *Sargent v. Parsons*, 12 Mass. 149; *Wilcox v. Wilcox*, 48 Barb. 327; *Dresser v. Dresser*, 40 Barb. 300; *Davidson v. Thompson*, 22 N. J. Eq. 83; *Barrell v. Barrell*, 25 N. J. Eq. 173-6; *Izard v. Bodine*, 11 N. J. Eq. 403; *Varnum v. Leek*, 23 N. W. Rep. 151; *Austin v. Barret*, 44 Ia. 488; *Reynolds v. Wilmeth*, 45 Ia. 693; *Israel v. Israel*, 30 Md. 120; *Noble v. McFarland*, 51 Ill. 226; *Sears v. Sellew*, 28 Ia. 501; *Kean v. Connelly*, 25 Minn. 222; *Hause v. Hause*, 13 N. W. Rep. 43; *Pico v. Columbet*, 12 Cal. 414; *Conard v. Conard*, 38 Ohio St. 467.

II. If this court should hold that the words of our law, "according to the justice and equity of the case," takes our statute

out of the long line of decisions hereinbefore quoted or referred to, and that it enlarges the rights of co-tenants and creates a new right in equity, how in equity do these defendants stand? Here is a field surrounded on three sides by the lands of this plaintiff; in addition to his right as a tenant in common to use and occupy this land, was his right to use his own property.

Chief Justice Field disposes of this case in equity, in *Pico v. Columbet*, *supra*.

III. The court erred in charging the plaintiff in error with interest. Rev. Stats. § 3181; Wait's A. & D., vol. 4, 127

*Newby & Morrow*, for defendants in error.

All the questions of law arising in this court on the finding of facts, are determinable, we think, by a construction of that part of section 5774 of the Revised Statutes, which reads as follows:

"One tenant in common, or coparcener, may recover from another his share of rents and profits received by such tenant or coparcener from the estate, according to the justice and equity of the case."

At common law, one tenant in common or coparcener could not maintain an action for rents and profits against another tenant in common or coparcener.

Hence the English Statute of 4 Anne, which gave an action *at law* by one co-tenant against another as bailiff. Our statute is quite similar to the English statute, except that our statute contains the additional words, "according to the justice and equity of the case." By the use of these additional words, we claim that the action given by our statute is not one at law, like the one given by the English statute, but is one in equity, where an account may be had by one co-tenant against another in possession of the common property. This view of the statute, we contend, is supported by this court in the case of *Conard v. Conard*, 38 Ohio St. 467.

And we submit that the meaning intended by the words "justice and equity of the case," as used in the statute, can mean nothing else than that if the tenant in possession of the common property has, by such possession, derived a benefit

therefrom in which the others, equally entitled with himself, have not shared, he shall be compelled to account and pay to them the amount that *their* property, not *his*, has benefited him.

OWEN, C. J. The principal question in the case, involves a construction of section 5774, of the Revised Statutes, which provides that: "One tenant in common, or coparcener, may recover from another his share of the rents and profits received by such tenant in common or coparcener from the estate, according to the justice and equity of the case;" etc. The fact that no such remedy was available at common law, led to the enactment of the statute of Anne, (4 Anne, ch. 16, sec. 27), which provides that "actions of account shall and may be brought and maintained \* \* \* by one joint tenant, and tenant in common, \* \* \* against the other, as bailiff for receiving more than comes to his just share or proportion," etc.

It is contended by the plaintiff in error, that neither this statute, nor our own, authorizes a recovery by the out-tenant against the tenant in possession, for the value of the mere use and occupation of the joint estate. There are cases which seem to sustain this construction of the statute of Anne, *supra*, where the tenant in possession is to be regarded as a bailiff of the out-tenants. A bailiff in husbandry was, at the common law, one appointed by a private person to collect his rents and manage his estates. (Bac. Abr.) The leading English case which holds that mere use and occupation by a tenant in common, did not create a liability against him to his co-tenants, is *Henderson v. Easen*, 17 Ad. & El. N. S. 701, 718. The court says: "It is to be observed that the statute does not mention lands or tenements, or any particular subject. Every case in which a tenant in common *receives* more than his share is within the statute; and account will lie when he does *receive*, but not otherwise. It is to be observed, also, that the receipt of *issues and profits* is not mentioned, but simply the receipt of more than comes to his just share; and, further, he is to account when he *receives*, not *takes*, more than comes to his just share." Further construing the language of the

statute, the court concludes that use and occupation merely do not render the possessory tenant in common liable to his co-tenants. It will be observed that the word "profits," whose absence from the statute of Anne is made prominent by the court, is supplied in our statute. This construction of the English statute has been followed in this country in *Sargeant v. Parsons*, 12 Mass. 149; *Woolever v. Knapp*, 18 Barb. 265; *Crane v. Waggoner*, 27 Ind. 52; *Ragan v. McCoy*, 29 Mo. 367, and other cases. A different view was taken of the same question in *Thompson v. Bostick*, 1 McMullan Eq. (S. C.) 75, where the court says that "to cultivate and have the use of lands, is to receive the rents and profits, though the occupier is his own tenant," etc. In *Early v. Friend*, 16 Grat. Va. 47, the judge speaking for the court says: "With all deference to the Court of Exchequer Chamber, I think the construction they put upon the word 'receiving,' is too technical and narrow at least for our country. \* \* \* I do not see the force of the distinction drawn by that court between the words 'receive' and 'take' in this connection. I think the word 'receiving' in the statute literally means a receiving of profits as well by use and occupation as by renting out the property." This view is taken in *Shiels v. Stark*, 14 Geo. 429; and in a recent case in Vermont, *Hayden v. Merrill*, 44 Vt. 336, where the court say: "It is safe to say that where the occupancy of one tenant in common is beneficial, and at a profit to such occupant, and is entire and exclusive, he is bound to account to his co-tenant for what he has received by such occupancy more than his just proportion." We think this the better view.

The question does not rest, however, upon a construction of the statute of Anne nor upon its assumed similarity with our own. In framing the latter the general assembly departed from the phraseology of the English statute. The language, which in the latter limited the liability of the tenant in possession to that of bailiff, is omitted. The words "*rents and profits*" are added. Then we are not at liberty to conclude or say that the words, "according to the justice and equity of the case," were added without a purpose. This court has said in *Conard*

v. *Conard*, 38 Ohio St. 467, construing this statute: "The action given by the statute is a 'civil action' for rents and profits 'received' by a co-tenant in excess of his full share, 'according to the justice and equity of the case.' The case made upon this record is not an action for the recovery of money merely, but for an account according to the principles of equity, in which neither party had a right of trial by jury. In this respect, at least, our statute differs from the English statutes of 4 Anne, C. 16 sec. 27, which gave an action at law against a co-tenant as bailiff."

We conclude that the voluntary and profitable use, occupation and enjoyment by a tenant in common of the common estate creates a liability against him to account to the out-tenant as for his share of the rents and profits received by the former, according to the justice and equity of the case.

II. It is maintained, however, that in the peculiar circumstances of the case at bar the judgment against the plaintiff in error is wholly without equity. The lands occupied by him adjoined his own, and there was no partition fence between them; he had ample pasture of his own, and for the cattle pastured upon the common estate, and did not need the pasturing with which he was charged. Nevertheless, he did use the lands, and the value of that use was \$150 per year. What effect the trial court gave to the conscious possession of these lands, as shown by the fact that "during different years of the time he was in possession he fed his cattle on the woodland of the premises described in the petition," we are not permitted to know. If he voluntarily used and enjoyed the profitable possession of the lands, it would not seem to be a defense against an action to account, that he did not need them—that he had sufficient pasturage of his own for his cattle.

The trial court was called upon to deal with all the facts according to principles of equity, and while this case seems at first view to sound in hardship, we cannot say that it is sufficiently clear to us that the court so far ignored the justice and equities of the case as to justify us in reversing its judgment.

III. Was there error in charging the interest?



---

 Arnold v. Donaldson.
 

---

The plaintiff in error was in no sense in default. His possession of the common estate was rightful. No demand was made upon him for its possession, nor for the value of the use until the suit was brought. The claim was one as for unliquidated damages. There was no warrant for charging him with interest upon each annual installment of the yearly rental value of the lands. In this there was error, for which the judgment is modified by deducting the interest included in the judgment, and as thus modified the

*Judgment is affirmed.*

---

 ARNOLD v. DONALDSON.

*Assignment of dower to former divorced wife of decedent—Application of the rule, caveat emptor, to purchasers at executor's sale, where dower has not been assigned—When executor cannot bind decedent's estate, by a promise of indemnity against incumbrances.*

An executor, under an order issued by the probate court in a suit to sell lands to pay the debts of the decedent, sold the same without making the former wife of the decedent, who had obtained a divorce from him on account of his aggressions, a party to the suit. The purchaser being advised by counsel that the title to the lands was clear and unincumbered, and that the wife had no dower-estate therein, bought the lands at their full value in money, paid over the money to the executor, and entered into possession of the premises. The court of common pleas afterwards adjudged, that the divorced wife was dowerable of the lands, and dower therein was accordingly assigned and set off to her. *Held*: That the purchaser can not maintain an action to recover back sufficient of the purchase-money, to compensate him for the loss he has sustained, by reason of the assignment of dower, and that the rule, *caveat emptor*, is applicable.

2. In the absence of authority derived from the will, or from the order issued by the court for the sale of the lands, the executor can not bind the estate of his decedent, by a verbal promise to indemnify the purchaser against incumbrances or defects in title.

(Decided November 13, 1888.)

**ERROR to the District Court of Wood County.**

The defendants in error, James Donaldson, Benjamin F. Kerr, Thomas J. Sterling, Smiley McKee, Lewis Fitch, Isaac

---

Arnold v. Donaldson.

---

Groff and William Markloff, filed their petition in the Court of Common Pleas of Wood County, against the plaintiffs in error, Wesley Arnold, Sarah Ann Seip, Louisa Bortle, Adaline A. Arnold, and George P. Hinsdale, as executor of the last will and testament of Emanuel Arnold, deceased.

The plaintiffs in their petition, in substance aver: "That Emanuel Arnold died on or about July 14, 1874, leaving a last will and testament, of which George P. Hinsdale was duly appointed and confirmed the executor; that the testator died seized and possessed of the following described lands and tenements situate in the township of Weston, county of Wood, and state of Ohio, to-wit: The west half of the south-west quarter of section number eight (8), township number five (5), north of range number nine (9) east, containing eighty acres; that defendants, Wesley Arnold, Sarah Ann Seip and Louisa Bortle are the only surviving children, heirs at law, and devisees of Emanuel Arnold; that some time in the year 1844, Emanuel Arnold intermarried with one Sarah Arnold, who on or about February 26, 1852, obtained a divorce from him by reason of his aggressions; that after the rendition of such decree of divorce in favor of Sarah Arnold, Emanuel Arnold was married to Adaline A. Arnold, and they lived together as husband and wife a number of years, when, she commenced an action against him for divorce and alimony, and duly obtained a divorce from him, by decree of said Court of Common Pleas of Wood County; that after Adaline A. Arnold had commenced her action for divorce and alimony against him, he paid to her by compromise and agreement about \$2,500, in consideration, and in lieu of all her marital and property rights against him or his estate, either by way of alimony, dower or otherwise; but through the mistake and inadvertence of the attorney who drafted the decree, the compromise and agreement was not entered upon the journal of the court; that afterwards, Sarah Arnold began her suit in the Court of Common Pleas of Wood County, praying that she might be endowed out of the above described lands and tenements, and of which her husband so died seized and possessed; that such proceedings were had in her suit, that it was adjudged by the

court, that she was entitled to dower in the above described premises, and the same was duly assigned and set off according to law; that some time after the death of Emanuel Arnold, the probate court, upon the petition of George P. Hinsdale as executor, finding it necessary to sell real estate to pay the debts of the testator and the costs and expenses of administration, duly issued an order to the executor, empowering and commanding him to appraise, advertise and sell said lands and tenements according to law; that in obedience to the command of such order, the executor did cause such lands and tenements to be appraised at their true value in money, and advertised and sold the same according to law to the plaintiffs for the sum of \$5,240—the plaintiffs not taking title thereto jointly, but mutually agreeing with each other to take and hold, in severalty, separate and distinct portions thereof, and severally pay said executor therefor; that George P. Hinsdale, executor, made said heirs-at-law and devisees of Emanuel Arnold, parties defendants to said proceedings for the sale of said lands and tenements, but did not make Sarah Arnold or Adaline A. Arnold parties thereto, because, the executor did not think that said Sarah or Adaline had any interest in or to said real estate, by way of dower or otherwise, and that he, the executor, had been so advised by counsel. That the plaintiffs believed when they purchased said lands, that they were acquiring a clear and unincumbered title thereto; that they were advised by counsel that said executor could make such a title to the same, and that neither Sarah Arnold nor Adaline A. Arnold had any interest by way of dower or otherwise, in said premises. That said executor believed he could make and was making a clear and unincumbered title to said lands and tenements, and in view thereof, caused the same to be appraised at their true value in money, free from dower, or any other lien or charge thereon: That the plaintiffs purchased the premises at their full value in money: That the sale to the plaintiffs was duly approved and confirmed by the probate court; that proper deeds of conveyance were executed and delivered to them, and they went into possession of said lands and tenements.

That on or about the 14th day of July, 1876, Adaline A.

---

Arnold v. Donaldson.

---

Arnold commenced an action in said court of common pleas, against the plaintiffs and the said defendants—the children and heirs-at-law and devisees of Emanuel Arnold—praying that she might also be endowed of the one-third of the two-thirds of said lands and tenements, and that it was adjudged and determined by said court, and by the District Court of Wood county, and by the Supreme Court of Ohio, that she was entitled to dower therein, and the same was duly set off and assigned to her according to law. That the court further adjudged the said Adaline A. Arnold to be entitled to the rental value of the one-third of said two-thirds of said premises, from the 14th day of July, 1876, to the first day of January, 1881, and accordingly rendered judgment against the plaintiffs, and in favor of said Adaline A. Arnold, for the sum of \$317.05 in lieu thereof, and made the same a lien and charge upon said lands and tenements, less the portion set off to Adaline, as aforesaid: That said George P. Hinsdale, when he sold said lands to the plaintiffs, promised and agreed to indemnify and keep them forever harmless, and that if dower was ever asserted or assigned to either Sarah Arnold or Adaline A. Arnold, he would refund to plaintiffs sufficient of said purchase money, paid by plaintiffs, to make them whole and keep them forever harmless, against any such claim or claims.

“That defendants, the heirs-at-law and devisees of said Emanuel deceased, were also of opinion that neither the said Sarah nor Adaline A. was entitled to dower in said premises. That since the dower has been assigned to the said Sarah, the said defendants, the heirs-at-law and devisees, have purchased the dower interest of the said Sarah in said lands, and paid her therefor, the sum of one thousand dollars in money, and said Sarah has quit-claimed all her right, title and interest in said premises to the plaintiffs.

“That the dower estate, set off and assigned to said Adaline A., covers the entire ten acres sold and conveyed to Benjamin F. Kerr, and six acres of the portion sold to Lewis Fitch, and by reason thereof, said Kerr and Fitch have been damaged in about the sum of five hundred dollars, to be rated *pro rata*, according to their relative purchases.

"That said executor, Hinsdale, has yet in his possession, as executor of said estate, and as part of the moneys arising from said sales, the sum of one thousand dollars (\$1,000), or more: That said executor has fully administered upon said estate, and has fully discharged and paid all debts and liabilities against the same, together with the costs and expenses of administration, and that said sum remains in his hands awaiting distribution amongst the defendants, Wesley Arnold, Sarah Ann Seip and Louisa Bortle, the children and heirs-at-law of said Emanuel, deceased.

"That said executor threatens to pay over, and distribute all of said moneys in his hands, to said children and heirs-at-law: That he will pay over all of said moneys to said heirs unless enjoined, by order of this court, from doing so until this cause can be fully heard; thereby leaving these plaintiffs wholly remediless at law; for plaintiffs say that all of said heirs are wholly insolvent, and that there can be nothing whatever collected from them on execution at law, and that if said sum is paid over to them, the same will be hopelessly and irredeemably lost to these plaintiffs."

The petition concluded with a prayer for an injunction and all proper and equitable relief. In the court of common pleas there was judgment for the plaintiffs. The defendants appealed to the district court, and there filed a demurrer to the petition, which was overruled. And thereupon the district court ordered and adjudged, that George P. Hinsdale, out of the moneys in his possession as such executor, and belonging to the estate of Emanuel Arnold, pay and refund to all the plaintiffs, *pro rata*, the amount, with interest, paid by them to Adaline A. Arnold in lieu of her dower from July 14, 1876, to January 1, 1881, and to the plaintiffs Benjamin F. Kerr and Lewis Fitch the sum of \$500, the present value of the dower estate set off and assigned to Adaline A. Arnold; that out of the residue thereof, he pay the costs of the action, and distribute the balance, if any in his hands, to Wesley Arnold, Sarah Ann Seip and Louisa Bortle. The circuit court awarded a special mandate to the court of common pleas, to carry the judgment

---

Arnold v. Donaldson.

---

of the district court into effect, and to reverse that judgment this proceeding is instituted.

*Jashar Pillars and John McCauley*, for plaintiffs in error.

*James R. Tyler*, for defendants in error.

DICKMAN, J. When the land of which the testator, Emanuel Arnold, died seized and possessed, was sold by the executor, George P. Hinsdale, under the order of the court of probate, the knowledge had been brought home to the purchasers, that Sarah Arnold and Adaline A. Arnold were then alive; that they had been wives of the testator, and had been divorced from him on account of his wrongs and aggressions. Prior to the sale, it was a subject of inquiry with the executor and purchasers, whether the latter could acquire a clear and unincumbered title, free from dower—the former wives of the deceased not having been made parties to the suit in the court of probate for the sale of the land. After advising with counsel, the purchase was made; but not until the executor had promised and agreed, to indemnify the purchasers against any claim for dower. The purchasers were, from the beginning, put on their guard, and acted in full view of the fact, that no dower had ever been assigned and set off to either of the wives. The right of the dowress is as plain and obvious as the right of the heir-at-law. It is a legal estate, and not a secret equity, and until assigned and set off, is a recognized incumbrance upon the land of the deceased husband. But the defendants in error purchased while cognizant that the surviving wives not only had not been endowed, but had not been made parties to the suit for the sale of the land, although the children, heirs-at-law and devisees of the testator, were parties to the proceedings. There is no intimation that any concealment, misrepresentation or fraud can be imputed to the executor, whereby the purchasers were induced to buy the land.

The facts in this case require, we think, the application of the rule, "Let the buyer beware." The maxim *caveat emptor* is applied in all its force to judicial sales. *Vattier v. Lytle's Executors*, 6 Ohio 477; *Corwin v. Benham*, 2 Ohio St.

37; *Creps v. Baird*, 3 Ohio St. 277; *Dunlap v. Robinson*, 12 Ohio St. 530; *Westfall v. Dungan*, 14 Ohio St. 276; *Mechanics' Loan Association v. O'Connor*, 29 Ohio St. 651. In the absence of fraud, the buyer buys at his own risk as to title. The executor's express warranty of title, unless authorized by the will or by the order of the probate court under which the sale is made, will not bind the estate of the testator. And no warranty of title by the executor, which can bind the estate, will be implied in law. He sells, and the purchaser gets only the interest or estate of the deceased in the premises, whatever it may be; and if the executor warrants expressly, he binds himself individually, but the warranty affects no one else.

It is alleged that when the executor sold the land to the defendants in error, he promised that he would indemnify them against any claim for dower, and that if dower should ever be asserted and assigned to either Sarah Arnold or Adaline A. Arnold, he would refund to the purchaser sufficient of the purchase money paid by them, to make them whole and save them harmless. It is not claimed that authority to make such promise in behalf of the estate, was derived from any power contained in the will, or from the order of sale issued by the court; and if any liability was incurred by reason of the promise, it was that of the executor individually. It was said by the court in *Dunlap v. Robinson*, *supra*: "If express covenants contained in the deed of the administrator, do not bind the estate, we think it clear that his verbal representations, in regard to the state of the title, can have no such effect. Whatever ground such representations may furnish for rescinding or setting aside the sale, or whatever personal liability they may impose upon the administrator, the law which gives him the character of a trustee, has conferred upon him no power to create liabilities against the estate by any warranties, either within or outside of his deed of conveyance."

It is averred in the original petition, that the executor caused the lands and tenements to be appraised at their true value in money, and that they were bought for their full value

in money. The executor could not have caused the appraisal to be made otherwise. And, as the surviving wives were not made parties to the action for the sale of the premises, and in no way appeared therein, there could not have been an appraisal subject to the dower interests. But the dower incumbrance existed nevertheless; and to what extent a knowledge of the existence of such a probable claim might have impaired the marketable value and saleableness of the property, we cannot definitely determine. It may be, however, that the purchasers would have been compelled to pay a higher price, had there been no such incumbrance, and they may have profited in their purchase by what others regarded a cloud on the title.

It is urged in behalf of the defendants in error, that at and before the time they purchased the lands and tenements, they, as well as the executor, honestly believed that neither Sarah Arnold nor Adaline A. Arnold were entitled to dower in the premises; in other words they were mistaken as to the law governing the dower-rights of the former wives. They had been divorced from their husband at the date of the executor's sale, and when the divorces were granted, the "act concerning divorce and alimony," passed March 11, 1853, (S. & C. 509) provided in section 7—which is substantially retained in the Revised Statutes—as follows: "That where a divorce shall be granted, by reason of the aggression of the husband, \* \* \* \* if the wife survive her husband, she shall also be entitled to her right of dower in the real estate of her husband, not allowed to her as alimony, of which he was seized at any time during the coverture, and to which she had not relinquished her right of dower." It would have been patent from an examination of the records of the court of common pleas, that neither at the time the divorce was granted to Sarah Arnold, nor at the time Adaline A. Arnold was divorced from Emanuel Arnold, was any allowance made by the court to either of them in lieu of their respective dower-rights. In view of the statutory provision, in connection with other facts set out in the original petition, it is manifest, that the claim of dower which might be asserted in the future, was not one of those latent defects of title which a vigilant buyer could



---

Railway v. Bosworth.

---

not guard against. Nor is there, in our view, in the case before us, such a mistake of law as to call for relief by a court of equity. The remedial power claimed by courts of chancery to relieve against mistakes of law, as said by the court in *Bank of the United States v. Daniel*, 12 Peters, 32, is a doctrine rather grounded on exceptions than upon established rules. It is well established, as was declared in *Hunt v. Rousmaniere*, 1 Peters, 15, that mere mistakes of law are not remediable, and "that whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character." The circumstances connected with the judicial sale to the defendants in error, were not of so unusual a character as to constitute an exception to the general rule.

We are of the opinion, therefore, that the demurrer to the plaintiff's petition should have been sustained by the district court; that the judgment of that court should be reversed, and the cause remanded to the circuit court for further proceedings.

*Judgment accordingly.*

---

RAILWAY v. BOSWORTH.

*Statutory duty of railroad company to fence its track, secs. 3324, 3325 and 3329, Rev. Stats.—Agreement of land-owner to fence—Whether it runs with the land as a burthen—Purchaser without notice—Constructive notice, what is.*

1. A written agreement by the grantor of the right-of-way to a railroad company, to fence it on each side through his lands, will not affect the right of a subsequent purchaser to require the company to fence its road, under the provisions of Sections 3324 and 3325, Revised Statutes, where the purchase was made without actual or constructive notice of the existence of such agreement.
2. Such agreement not being recorded, the mere use and occupation of the right-of-way by the company and its successors for the purpose of a railroad, will not constitute constructive notice of the existence of such agreement.

(Decided November 13, 1888.)

ERROR to the Circuit Court of Clinton County.

---

Railway v. Bosworth.

---

In the original action the plaintiff sought to recover of the defendant \$570.00 as the reasonable cost of building a fence on each side of its right-of-way through his lands, under the provisions of sections 3324 and 3325 of the Revised Statutes, imposing the duty on railroad companies of fencing their roads, and giving the abutting owner the right to build the fences and to recover the reasonable cost of the company, where it fails to do so.

The defendant answered, relying on an agreement by which one A. W. Miller, who in 1852 granted the right-of-way to its predecessor, bound himself to keep up and maintain the fences on the line through his lands, and from whom the plaintiff by intermediate conveyance, derives his title. A demurrer to this having been overruled, the plaintiff replied denying the existence of the agreement, or any knowledge of it at the time he purchased.

The case was submitted to the court on an agreed statement of the facts, which is as follows:

“ AGREED STATEMENT OF FACTS.

“The parties to this action agree that the following statement contains and shall constitute the facts therein:

“1. That the facts stated in the petition are true.

“2. That the plaintiff derived his title to the lands described in the petition through, by, and under Andrew Miller.

“3. That on the 17th day of June, A. D. 1852, the said Andrew Miller was the owner of said lands, and on that day executed and delivered to the Cincinnati, Wilmington & Zanesville Railroad Company a certain paper writing, in the words and figures as set forth in a copy thereof hereto attached, marked exhibit “A,” and made a part of this agreed state of facts, and under, and by virtue of which said company entered upon said lands and built its road through the same.

“4. That the railroad stock specified in said paper writing was delivered to said Andrew Miller, and said crossing and cattle-guards built as in said paper writing required.

“5. That said paper writing was on the 21st day of January, A. D. 1884, recorded in the office of the Recorder of Clin-

---

Railway v. Bosworth.

---

ton county, Ohio, and after the commencement of this action, and at no other time.

"6. That the plaintiff had no actual notice of the existence or contents of said paper writing, his only notice being the use and occupation of the roadway through said lands by the defendants and the several companies through and under which it claims as stated in its answer.

"7. That the defendant occupies and possesses said railroad by virtue of a lease thereof from the Cincinnati & Muskingum Valley Railway Company for the term of ninety-nine years, not yet expired. That said Cincinnati & Muskingum Valley Railway acquired the title to said railroad and all interests and property connected therewith, including rights of way, by means of certain mortgages and judicial sales thereof, thereunder, and at and from the said Cincinnati, Wilmington & Zanesville Railway Company as fully as such proceedings could transfer them, and the said Cincinnati, Wilmington & Zanesville Railway Company has long since ceased to exist as a corporation.

"The above agreed statement of facts is submitted to the court as containing all the facts in the case to be entered of record as such, and upon which the court is asked to pronounce the law alone.

"EXHIBIT 'A.'"

"State of Ohio,            }  
    Clinton County.        }

"In consideration of one dollar to me paid by the Cincinnati, Wilmington & Zanesville Railroad Company, I do hereby grant and release to said company the right to enter upon any lands I own, which lie on the line of said company's road, surveyed and adopted by them, (or intended to be surveyed or adopted by them) and the right to run in curves and amend the line on the final construction of such railroad over said land, and to hold and use a strip thereof to be selected by the engineers, not exceeding 100 feet in width, for the purpose of a railroad so long as may be necessary, and to use the material standing or lying on said strip for the construction

---

Railway v. Bosworth.

---

and repair of said road. I also agree to build and sustain all fences on each side of said roadway, and to pay all taxes on said land during the occupancy by said company of the same; and also the right of crossing other parts of my land to get at said railroad in construction and repair of said road. I will require said company to construct a farm crossing at the nearest surface grade, or within two feet thereof where I select; also a cattle guard on either side, and I hereby demand for said privilege four hundred and fifty dollars to be paid in stock of said company. •

“Witness my hand and seal the seventeenth day of June, A. D. 1852.

“A. W. MILLER, [SEAL.]

“In presence of Lawrence Fitzhugh.

“Received January 31, 1884.

“Recorded February 1, 1884.

“E. B. HOWLAND, Recorder.”

The common pleas rendered judgment for the defendant below; this was reversed on a proceeding in error by the circuit court, and judgment rendered for the plaintiff for the amount of his claim; and this proceeding is now prosecuted to reverse the circuit court and affirm the common pleas.

*John S. Brasee*, for plaintiff in error.

*J. B. Foraker*, for defendant in error.

MINSHALL, J. A number of questions presented in argument as arising upon the record, need not, from the view we take of the case, be disposed of here. (1.) Thus it is claimed that the rights conferred by the agreement between the original parties, did not pass to the present owner of the railroad, because “successors” are not named, and that, therefore, the right-of-way itself, as well as the agreement as to fencing, was limited to the original company, and that the present owners can take nothing under that agreement. But, speaking for myself, I think this is not so. Being a grant to a corporation aggregate, it might last forever, and so the word “successors” was not necessary to create a perpetuity of right, or a fee sim-

ple. Words of perpetuity are only necessary to create such right, where the grant is to a corporation sole. 2. Blk. Comm. 109, Angell & Ames, Corp. § 172; *Overseers of the Poor v. Sears*, 22 Pick. 122; Shaw, C. J., 126, Mora. Corp. § 330. (2.) Again it is contended that the obligation to build the fence is a personal one, binding upon the grantor only, and that it was not susceptible of being imposed upon the land so as to run with it as against subsequent purchasers. But, speaking for myself, I am inclined to think, after a pretty full examination of the authorities, that there is nothing in the nature of the burthen that would prevent its being made to run with the land of the grantor as against subsequent owners, in favor of the right-of-way granted. That it would not have been so at common law may be conceded. It, with characteristic rigidity proceeded upon a few inelastic principles. It did not admit of any new or unusual burthens being imposed upon the land, and required in all instances that a privity of estate should subsist between the parties—the owner of the land upon which the burthen was placed and the owner of the land enjoying the benefit. But, to prevent the unjust disappointment of expectations raised by agreements not regarded at law, equity, in the exercise of one of the frequent grounds of its jurisdiction, that of fraud, recognized and applied a different principle to such covenants. It took into consideration the convenience of the parties and their intention in the matter, rather than the technical rules of the common law, and generally gave effect to the intention, where the covenant concerned the land and would promote the convenience of the parties in the use and enjoyment of it. Such covenants were not regarded as collateral, and were made to attend the land and affect its ownership as against purchasers with notice. *Whitney v. Union R. R. Co.*, 11 Gray, 359, 364; *Trustees v. Finch*, 70 N. Y. 440, 449; 1 Smith's Leading Cases, 6 Am. Ed. 167, Pom. Eq. Juris. § 689, § 2295 and § 1342. Holm. Com. Law, 392 *et seq.* There are, however, cases and authorities which limit the doctrine to what are called *restrictive* covenants, and stop short of *affirmative* ones, like that in this case. Pol. Cont. 227, 228. But they are not general.

---

Railway v. Bosworth.

---

Many cases are to be found where affirmative covenants have been held to run with the land, on the ownership of which the burthen of performing them is imposed. *Blain v. Taylor*, 10 Abb. Pr. 228; *Burbank v. Pilsbury*, 48 N. H. 475; *Bronson v. Coffin*, 108 Mass. 175; *Kellog v. Robinson*, 6 Vt. 276; *Holmes v. Buckley*, 1 Abr. Eq. 27; *Allen v. Culver*, 3 Denio, 284, 293; Pom. Eq. Juris. § 689 and *n.* 5, § 1295; Holm. Com. Law, 402. And, in *Huston v. R. R. Co.*, 21 Ohio St. 236, an agreement of the railroad company to keep up the fences and crossings, was held, by this court, to run with the land so as to be binding as between the assignees or grantees of both the parties. And, in the prior case of *Easter v. Railroad Co.*, 14 Ohio St. 48, the agreement of the owner in his grant of the right-of-way to the company to keep up the fences, was, also, held to run with land. Gholson, J., in delivering the opinion, said: "The construction and maintenance of a fence on each side of the strip of land over which the right-of-way was to be exercised, manifestly affected the mode of enjoying it, and it may properly be added, beneficially to both parties." In this case "assigns" were mentioned. But this is not material, where it may be inferred from the circumstances that such was the intention. Thus in *Masury v. Southworth*, 9 Ohio St. 340, it was held that a covenant by a lessee to insure ran with the land, and might be asserted by the assignee of the reversion against the assignee of the lessee, though not mentioned, where it appeared from the circumstances that such was the intention of the parties to the covenant. The addition of the agreement to *sustain*, to the agreement to *build* the fences, necessarily makes the obligation coextensive with the duration of the grant, and compels the inference that the parties intended to treat it as attending the land of the grantor so long as the way granted should be used for the purpose of a railroad. "An owner may subject his lands to any servitude, and transmit them to others charged with the same; and one taking the title to lands, with notice of any equity attached thereto, or any outstanding right or claim affecting the title or the use and enjoyment of the lands, takes subject to such equities,

and such right or claim, and stands in the place of his grantor, bound to do or forbear to do whatever he would have been bound to do or forbear to do." Allen, J., in *Trustees v. Lynch*, 70 N. Y. 449. In equity, the precise form of the covenant or agreement is immaterial, if the intention is reasonably clear. Thus, it is said: "It is not essential that it should run with the land at law. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform." *Whitney v. Union Ry. Co.*, 11 Gray, 364. Bigelow, J.

But it is not necessary to determine either of these questions. The suit was brought to enforce a claim based upon the obligation of the company, created by the statute (§§. 3324 and 3325, R. S.) to fence its track. It, by way of defense, relied upon a certain agreement as bringing it within the provisions of section 3329. The agreement obliges the owner of the land from which its predecessor acquired its right-of-way, to keep up and maintain the fences along the track on each side; and the plaintiff derives his title from the same person. This agreement, whether susceptible of being admitted to record or not, was not recorded until after the suit was brought. And the agreed statement is "that the plaintiff had no actual notice of the existence of said paper writing." Now, conceding that there may be some question as to whether such an agreement may be made to run with the land so as to affect a subsequent purchaser, yet, in every case, where it is so held, it is subject to the equitable qualification that the purchaser had notice of the agreement. In treating the subject, Mr. Pollock says: "All these rights and liabilities being purely equitable, are like all other equitable rights and liabilities subject to the rule that purchase for value without notice is an absolute defense." Pol. Cont. 226, Pom Eq. Juris. § 689. And we may further observe, that to give them such effect as against a purchaser

without notice, would, not only be inequitable, but contrary to the policy of our recording statutes.

The fact that the defendant was in the possession and occupation of its road over the land at the time the plaintiff purchased, does not amount to constructive notice of the existence of such agreement. Such possession would be notice of the usual incidents of such right-of-way, but not of such as are exceptional. The general duty to fence its track is imposed by statute upon a railway-company. This was the statute at the time the plaintiff purchased. The right asserted by the defendant is exceptional to its statutory duty, and its possession was not, therefore, constructive notice to the plaintiff of its existence. There must be some visible material object upon or connected with the land, the sight or knowledge of which would reasonably suggest the existence of the right to constitute constructive notice. Pom. Eq. Juris. § 600. No such object is shown to have existed in this case, from which it might reasonably have been inferred that the owner of the land purchased by the plaintiff, was under an obligation to fence as claimed. Nor had there been any such exaction of the right upon the one hand or performance of the duty upon the other, as would, by its notoriety, have amounted to notice. Had the instrument been properly executed, acknowledged and recorded, it would have constituted notice; but such was not the case; and the rights of the defendant under it are of an equitable nature, and cannot avail against a purchaser without notice.

The provision contained in section 3329, of the Revised Statutes, to the effect that section 3324 shall not be held to affect "any contract or agreement" between "any railroad" and "the proprietor of lands adjoining" for "the construction and maintenance of fences," is limited by its terms to parties to the agreement; and, whilst we have no doubt but that such agreements may be made to attend the ownership of the lands adjoining the road, yet this can only be done against those who purchase with notice, actual or constructive.

*Judgment affirmed.*



## MOORE v. ADM'R OF MOORE.

*Allowance to widow for year's support—Application to probate court for review—  
Order overruling, is final—Appeal—Section 6043,  
Revised Statutes, construed.*

The order of a probate court overruling an application of a widow for a review of the allowance made her by the appraisers for a year's support from the estate of her deceased husband, under section 6043, Revised Statutes, is an adjudication of the rights of the widow and other persons interested as to the question of allowance, and, unless such order is vacated by appeal, or other proper proceeding, is a final determination between them.

(Decided November 13, 1888.)

## ERROR to the Circuit Court of Belmont County.

John Moore died March 22, 1884, leaving surviving him his widow, aged seventy-six years, the plaintiff in error. On June 5, 1884, the appraisers of said decedent's estate set off to the widow for her year's support, in addition to provisions on hand, the sum of \$162.50. The widow filed her petition in the probate court, October 20, 1884, for review and increase of allowance, which application was refused and no appeal taken, or other proceedings had to vacate the same. Afterwards, on the 2d day of May, 1885, the widow filed another application for increase of allowance, stating that the amount set off by the appraisers had proved to be insufficient, and that since her first application there had been a change in her condition; that she had been sick and comparatively helpless, and that she needed and received nursing and medical attention, and incurred increased expense therefor. To this petition defendant in error answered, alleging that the allowance made by the appraisers was sufficient, and that the application for increase, filed October 20, 1884, was passed upon by the probate court, and that she was estopped thereby. To this answer plaintiff replied, denying that the matter set out in her petition had been passed upon or adjudicated. Upon hearing had in the probate court, the proceeding was dismissed, and an appeal was taken. At the trial in the common pleas, there was a finding

---

Moore v. Adm'r of Moore.

---

of facts to the effect that a reasonable and proper allowance by the appraisers would have been \$150 more than the amount allowed by them, and that the allowance should have been increased by that much at the time of review by the probate court, and that at the time of the review the widow was in feeble health, and that in January, February and March next ensuing, she became worse, and required the attention of physicians and additional care, and that the additional expenses and services necessary by reason of such subsequent sickness, was of the value of \$100. Upon these facts the court of common pleas held that the probate court had no authority to further review and increase the allowance made by the appraisers, and dismissed the petition. The judgment of the court of common pleas was, on error, affirmed by the circuit court.

*Rees & Hoff*, for plaintiff in error.

The liability of the estate of a decedent for the support of his widow for one year, as provided by sections 6040-6043, Rev. Stats., has been affirmed in all cases where the question has been presented.—*Collier v. Collier*, 3 Ohio St. 369; *Dorah v. Dorah's adm'r*, 4 Ohio St. 292; *Bane v. Wick*, 14 Ohio St. 506; *Allen v. Allen's adm'r*, 18 Ohio St. 234; *Sherman, adm'r, v. Sherman*, 21 Ohio St. 631.

The plea of "former adjudication" is tenable only where it is shown that at the trial of the cause, in which such former judgment was rendered, the same evidence could have been presented, and to the same effect, as in the cause in which such plea is made, and that the condition of the parties is the same in every material respect as at the former trial. What may occur, and what did occur, are not within the scope of "identities" required by the plea of *res adjudicata*.

Subsequent to the alleged judgment, on the application of October 20, 1884, the widow was ill. There was a serious change in her condition—one adding largely to the cost of her support, and so found by the trial court. Had the increase of allowance been made, as it is stated by the court of common pleas it should have been, to the amount of \$150, the plaintiff in error would have been entitled to the addi-

tional \$100 by reason of the change of condition. *Sherman, adm'r, v. Sherman, supra.*

*L. Danford*, for defendant in error.

The appraisers, by virtue of section 6040, Rev. Stats., made their allowance and returned the same into the proper court. The plaintiff in error being dissatisfied therewith, had a right, under section 6043, to file her petition in the court to which the allowance was returned, asking for a review of such allowance by the court, and for an increase of the same; this she did, and the court passed on her petition upon full hearing, and if still dissatisfied, she could appeal; this she did not do, but filed another petition May 2d, 1885, asking of the same court precisely the same thing, to-wit: a review of the allowance of the appraisers and an increase of the same.

The authority conferred on the probate court, by section 6043, was exhausted by the proceedings had under and by virtue of the petition of October 20th, 1884, and any one interested had a right to interpose the former action of the plaintiff as a bar to the present proceeding; the administrator certainly had such right.

We scarcely need cite authorities upon so elementary a proposition, but may refer to Bigelow on Estoppel, pages 44-45.

A review of the allowance of the appraisers and an increase of the same is sought in both the former and present proceeding; nothing else could be sought. Under the statute, section 6043, the court has only the power conferred by that statute, and the proceeding must necessarily be the same.

SPEAR, J. Section 6040, of the Revised Statutes, makes it the duty of the appraisers to set off and allow to the widow, and children under the age of fifteen years, if any there be, sufficient provisions or other property to support them for twelve months from the death of the deceased, and the following section provides that where there is not sufficient personal property, or property of a suitable kind, the appraisers shall cer-

tify what sum, or further sum, in money, is necessary for the support of such widow or children. Following these requirements, the appraisers set off to the plaintiff in error, both provisions and money.

Section 6043 gives authority to the probate court, on petition of the widow, or other person interested, to review the allowance, and increase or diminish the same, and make such order as it may deem right and proper.

Under the authority of this last mentioned section, the plaintiff in error sought the action of the probate court by her petition of October 20, 1884, and that court's finding and order was an adjudication of her right to further allowance. If dissatisfied, she had the right to appeal, or prosecute a proceeding to vacate. Having omitted to avail herself of such right, she cannot, by a new petition, again invoke the action of the probate court upon the same question. The duty of that court was to review the proceedings of the appraisers. That duty it performed in the case first brought, and made a final order, and its power over the question was thereby exhausted.

This conclusion may seem to involve hardship, but a contrary one would involve the most perplexing uncertainties as to the rights of widows and the duties of administrators. If a widow may have such a question again reviewed by the same court, an administrator or other person interested may. The appraisers, in making their allowance, are expected to take into account the age of the widow, her condition and prospect as to health, and all surrounding circumstances. If the widow were permitted to review as often as she might desire, the question involved, because of a changed condition of health, it would follow that, in a case where the widow was ill at the time the appraisers acted, and recovered later, the administrator, or any interested person, might seek such continued reviews by the same court for the purpose of reducing the allowance, and thus the question of allowance be kept open, to the unreasonable embarrassment and injury of those interested in the settlement of the estate.

*Judgment affirmed.*

## DUNN v. AGRICULTURAL SOCIETY.

*Negligence—Personal injury—Damages—Liability of county agricultural societies for.*

A county agricultural society, organized under the act of February 28, 1846 (44 O. L. 70), and amendments thereto, which has constructed seats on its fair grounds for the use of its patrons, is liable, in its corporate capacity, to an action for damages, by a person who, while attending a fair held by it, and rightfully occupying the seats, sustains an injury in consequence of its negligence in their construction.

(Decided November 13, 1888.)

ERROR to the District Court of Brown County.

The plaintiff, Rebecca J. Dunn, commenced her action in the Court of Common Pleas of Brown County, against the Brown County Agricultural Society, by filing the following petition :

“ The plaintiff says :

“ That the defendant is a corporation duly incorporated under the laws of the state of Ohio, and in its corporate capacity held its regular annual fair on its fair grounds at Georgetown, Brown county, Ohio, on the 5th, 6th, 7th and 8th days of October, A. D. 1880, to which fair the public were generally invited to attend, and on the said 7th day of October, 1880, the plaintiff attended said fair, and paid the defendant a valuable consideration for permission to enter said fair grounds and witness the exhibition of stock and products on exhibition for premiums at said fair.

“ The said defendant had theretofore prepared a large number of seats, and erected the same upon its said fair grounds for the accommodation of its patrons and persons attending the said fair, and in erecting and constructing said seats was guilty of gross carelessness and negligence, and negligently constructed and erected said seats, and with like negligence, used and put into the construction of said seats unsound and weak lumber, and which was not sufficiently strong to bear the weight of persons who might be seated thereon.

---

Dunn v. Agricultural Society.

---

“The plaintiff after entering said fair grounds on the 7th day of October, A. D. 1880, was seated upon one of the seats so prepared as aforesaid, and the same being unsound and weak as aforesaid, broke and caused the plaintiff to fall the distance of about five feet, without any fault or negligence upon her part, whereby the plaintiff was greatly injured in her person in this, to-wit: Both bones of her right forearm were dislocated, and she was otherwise greatly bruised and injured upon her arm and shoulder, by reason of which fall and injury she has become permanently and for life crippled and disabled in the use of said right arm, and by reason of said fall and injury she became sick and suffered great pain and anguish of body and mind, and incurred a large expense in and about the employment of physicians to heal and cure the same, amounting to the sum of thirty-five dollars, and has been unable to perform ordinary work by reason of said injury, and has suffered \$200 loss by reason of her being unable to work and loss of time as aforesaid.

“Plaintiff therefore says that, by reason of all the premises, she has been damaged in the sum of three thousand dollars, for which she prays judgment.”

The answer denies “all negligence and want of care charged in the petition,” and for a separate and second defense, alleges that the defendant is “a county agricultural society, organized under an act of the legislature of the state of Ohio, entitled an act ‘for the encouragement of agriculture,—passed February 28, 1846,’ and has complied with the conditions of said act and performed all the duties made incumbent on it thereby, and by any other legislation of the state passed since said act. It has been such agricultural society of Brown county, Ohio, since the—— day of——, A. D. 1849, until the present time, and has held fairs, paid premiums, received moneys from the treasurer of Brown county, and performed all other duties required of it by law as such agricultural society, during all that period.”

To this second defense the plaintiff demurred, on the ground, that the facts therein stated do not constitute a defense to the plaintiff’s action. The demurrer was overruled, “and the

plaintiff not desiring to reply, but electing to abide by her demurrer," the petition was dismissed, and judgment rendered against her for costs.

The judgment was affirmed by the district court, and this proceeding in error is prosecuted to obtain the reversal of both judgments.

*W. W. McKnight*, for plaintiff in error.

The trial court held that the defendant was a "*quasi* public corporation," and as such not liable for the torts and negligence of its officers or agents, and this was affirmed by the district court, and the *only* question now for consideration is, did the common pleas and district courts err in holding that the defendant was not liable for the negligence of its officers and agents? This is the only question now in this case, and we maintain the lower courts erred in their holding.

*First*—Because a corporation is for the *public* good and welfare, it does not follow that it is a *public* corporation, for all corporations are created for the public good; private corporations are as much for the public good as are public corporations. See *Dillon on Municipal Corporations*, vol. 1, secs. 53, 57.

A *public* corporation is one that is called into existence without the consent of the people or locality to be effected, and are such as are *exclusively* for public purposes. The whole interest must be for civil or local government, such as counties, towns or school districts. *Id.*, vol. 1, sec. 54.

A *private* corporation is one that is called into existence by the consent of the incorporators, it is such a corporation as is not bound to accept a charter or incorporating act. *Id.*, vol. 1, sec. 52; *TenEyck v. Delaware & Raritan Canal Co.*, 3 Harrison (N. J.), 200.

A private corporation may be classified as a voluntary corporation. A public corporation is an involuntary one.

An incorporated city or village as a general rule is a private or voluntary corporation, and as such is liable for the negligence of its agents and officers.

It makes no difference whether the corporation is for profit, pleasure, mutual encouragement or for educational or religious improvement, it is at last but an individual pursuing a purpose, and like other individuals is liable for the torts and negligence of its officers and agents. *Dayton v. Pease*, 4 Ohio St. 80, and cases cited; *A. & A. on Corp.*, 11th ed., secs. 310, 311, 382, 392; *Brown v. South Kennebec Agricultural Society*, 47 Maine, 275; *Riddle v. Pro, Locks & Canals*, 7 Mass. 169.

The defendant accepted voluntarily the incorporation act, by the voluntary act of the thirty persons, for the mutual benefit of themselves and others and thereby became a private corporation.

The acts under which the defendant organized, we cite *Swan's Stat. of 1854*, sec. 1, p. 35; *Id.*, sec. 24 (1), p. 39.

These sections are substantially the same as are now found in the Revised Statutes. See Revised Statutes, sections 3679 to 3700.

The defendant having voluntarily accepted the incorporating act, became a private corporation as much as though it had been a corporation for gain or pleasure.

No brief for defendant in error.

WILLIAMS, J. The petition, it must be conceded, states a cause of action, to which the paragraph of the answer demurred to, is no defense, unless the defendant is protected against liability for its negligence, by the law under which it was incorporated, or can in some way derive such protection from it.

There is a class of public corporations, sometimes called civil corporations, and sometimes *quasi* corporations, that, by the well settled and generally accepted adjudications of the courts, are not liable to a private action in damages, for negligence in the performance of their public duties, except when made so by legislative enactment.

Of this class, are counties, townships, school districts and the like. The reason for such exemption from liability, is that organizations of the kind referred to, are mere territorial and political divisions of the state, established exclusively for



public purposes, connected with the administration of local government. They are involuntary corporations, because created by the state, without the solicitation, or even consent, of the people within their boundaries, and made depositaries of limited political and governmental functions, to be exercised for the public good, in behalf of the state, and not for themselves. They are no less than public agencies of the state, invested by it, of its own sovereign will; with their particular powers, to assist in the conduct of local administration, and execute its general policy, with no power to decline the functions devolved upon them, or withhold the performance of them in the mode prescribed, and hence, are clothed with the same immunity from liability as the state itself.

*The Board of Commissioners v. Mighels*, 7 Ohio St. 119; *Finch v. Board of Education*, 30 Ohio St. 37; *The State v. Powers*, 38 Ohio St. 54; *Bigelow v. Randolph*, 14 Gray, 541; *Lloyd v. The Mayor, etc.*, 1 Selden, 369; *Bailey v. The Mayor, etc.*, 3 Hill, 531; *Riddle v. Locks and Canals*, 7 Mass. 169; *Brown v. South Kennebec Agricultural Society*, 47 Maine, 275.

This rule of exemption, however, extends no further than its reason, and therefore has no application to corporations called into being by the voluntary action of the individuals forming them, for their own advantage, convenience or pleasure. Corporations of this class, which are but aggregations of natural persons associated together by their free consent, for the better accomplishment of their purposes, are bound to the same care, in the use of their property, and conduct of their affairs, to avoid injury to others, as natural persons; and, a disregard or neglect of that duty, involves a like liability.

When, therefore, it is determined, to which of these classes of corporations the defendant belongs, a decision of the case is reached; and, to do this, an examination of the statutes, under which the organization of the defendant was effected, becomes necessary.

The act of February 28, 1846, and the amendments thereto, in so far as they aid this inquiry, in substance provide; that thirty or more persons, residents of the county, may, by organ-

izing themselves into a society for the improvement of agriculture, adopting a constitution and by-laws for their government, and appointing the customary officers, become a body corporate, with capacity to sue and be sued, "and perform all such acts as they deem best calculated to promote the agricultural and household manufacturing interests" of the county and state; and, when they shall pay to the treasurer of the society, "by voluntary subscription, or fees imposed on its members, any sum of money in each year not less than fifty dollars," they are entitled, upon the certificate of the president, verified by the oath of the treasurer, to the effect that such payment has been made, to draw from the county treasury an equal amount, but not to exceed two hundred dollars. The societies are also made capable "of holding in fee-simple, such real estate as they have purchased or may hereafter purchase, for sites whereon to hold their fairs," and, to receive and make conveyances and agreements in relation thereto. The county commissioners are authorized, "if they think it for the best interests of the county and society," to contribute out of the county treasury, for the purchase or lease of such site, a sum equal to, or greater than that paid by the society for the purchase or lease thereof, but no tax shall be levied for a sum greater than that paid by the society, unless a majority of the electors of the county, voting at some general election, shall vote in favor of such tax. The society is empowered to sell its fair grounds "in such manner and on such terms as it may deem proper," and conveyances therefor may be executed by the president; but "grounds owned partly by the society and partly by the county," cannot be sold or incumbered, without the consent of the commissioners, and when sold, the conveyance must be executed by the commissioners, as well as the president of the society. The money arising from the sale, is required to be paid into the county treasury, and cannot be paid out, without the consent of the commissioners.

The duties enjoined on such societies are, to "offer premiums for the improvement of soils, tillage, crops, manures, implements, stock, articles of domestic industry, and such other articles, productions and improvements, as they may deem proper,"

and, to so "regulate the amount of premiums, and the different grades of the same", that "small as well as large farmers" may "have an opportunity to compete therefor." They are required to publish a list of the awards, and an abstract of the treasurer's report, in the newspapers of the county, and report annually their proceedings, with a synopsis of the awards, a description of the improvements, and the condition of agriculture in the county, to the State Board of Agriculture.

From this summary of the statutes, it is apparent, that corporations formed under them, are not mere territorial or political divisions of the state; nor are they invested with any political or governmental functions, or made public agencies of the state, to assist in the conduct of its government. Nor can it be said, that they are created by the state, of its own sovereign will, without the consent of the persons who constitute them, nor that such persons are the mere passive recipients of their corporate powers and duties, with no power to decline them, or refuse their execution. On the contrary, it is evident that societies organized under the statutes, are the result of the voluntary association of the persons composing them, for purposes of their own. It is true, their purposes may be public, in the sense, that their establishment may conduce to the public welfare, by promoting the agricultural and household manufacturing interests of the county; but, in the sense, that they are designed for the accomplishment of some public good, all private corporations are for a public purpose, for the public benefit, is both the consideration and justification for the special privileges and franchises conferred on them. These agricultural societies are formed of the free choice of the constituent members, and by their active procurement; for, it is only when they organize themselves into a society, adopt the necessary constitution, and elect the proper officers, that they become a body corporate. The state neither compels their incorporation, nor controls their conduct afterward. They may act under the organization, or at any time dissolve, or abandon it.

While the authority is not in terms conferred on such so-

cieties, to hold fairs, and charge for admission to them, the power to "perform all such acts as they deem best calculated to promote the agricultural and household manufacturing interests" of the county, appears to be ample, for that purpose, and also to authorize the society to select the site whereon to hold the fair, adopt plans for buildings and superstructures, and erect them, at its pleasure. The society is absolutely free, to determine whether it will erect any buildings, or seats, for the accommodation of its patrons, and, if any, what kind, and of what material. It is subject to no control, either in the selection of the material, or in the employment of the architect, superintendent or workmen; and the whole management and conduct of the fair, is committed to it, and its officers, with the power, to determine what shall be done, how it shall be done, and by whom it shall be done. In short, in the execution of the powers conferred on it, the society selects its own agents, is invested with the sole control over them, and may, for its own indemnity, exact such guarantees against the want of skill and care in their employment, as it may deem proper, and be able to obtain.

There are cases, where a party, under no legal obligation to perform an act or service, may, nevertheless, be liable for damages caused by his negligence, if he voluntarily enter upon its performance. And, though the defendant below, was not bound to provide seats for the convenience of persons attending its fairs, and the omission to do so, would subject it to no liability, yet, having voluntarily entered upon their construction, for the purpose of being occupied by the people present, and to afford them greater convenience and comfort in witnessing the exhibition, thus constituting, when completed, an invitation to occupy them, as well as an inducement for the patronage of the fair, every consideration of right and justice requires, that in their construction, the society should have a careful regard for the safety of those for whose use they were designed, and who should act upon the invitation. And, since the defendant selected, and controlled its own agents and servants, and might, by the exercise of due care in their employment,

have secured the construction of seats, that were suitable, and therefore safe (for they can be suitable only when safe), that law of social duty, which exacts of all, that they shall so conduct themselves as not to injure others by their neglect, forbids that the defendant should interpose its own incorporation, self-sought, and voluntarily maintained, as a shield against liability to one who, being rightfully upon the seats, and free from fault, is injured by reason of its negligence in their construction.

Besides, it is evident that the defendant has, or may have, a corporate fund; for, it is authorized to hold in fee-simple, "such real estate as it has purchased, or may hereafter purchase, for sites whereon to hold fairs;" and there appears to be no limit affixed, either to the quantity, or value, of the real estate it may so own. True, it is provided, that if the county commissioners, with the county funds, contribute towards its purchase, it cannot be sold or encumbered without their consent; but the answer contains no allegation, that such contribution was made in the purchase of the defendant's grounds.

Then, again, the statute imposes no limitation upon the amount that may be charged for entry fees, or for admission to the fair; nor is there anything in the statute which requires the society to expend the whole of its receipts, in the payment of premiums, awards or expenses, or for any other specific purpose. They shall offer premiums "as they deem proper," is the language of the statute. The income, may many times exceed the expenditure, and hence, not only may a corporate fund be acquired, but it may be distributed among the members, or held for other disposition, at the pleasure of the society, and the corporation may thus become one of pecuniary profit, with the control and management of property, real and personal; and we see no reason why, for private injuries, caused by the improper management of its corporate property, it should not be held to the same general liability, as natural persons who own and manage the same kind of property.

Our conclusion is, that the facts stated in the portion of the answer demurred to are insufficient to constitute a defense to

---

Senff v. Pyle—Mannix, Assignee v. Purcell et al.

---

the case made by the petition, and the demurrer should have been sustained.

*Judgment of the district court, and of the court of common pleas reversed, and the cause remanded, with instructions to sustain the demurrer, and for further proceedings.*

---

SENFF v. PYLE.

*Finding of facts—Circuit court not required to make, under sec. 6710 Rev. Stats.*

(Decided November 13, 1888.)

ERROR to the Circuit Court of Ross County.

BY THE COURT. The circuit court is not, under section 6710 of the Revised Statutes, as amended May 4, 1885 (82 Ohio L. 230), required, in a proceeding in error, to make a finding of facts, though the evidence is all set forth in a bill of exceptions.

*Judgment affirmed.*

---

MANNIX, ASSIGNEE v. PURCELL ET AL.

*Archbishop of Roman Catholic Church—His title to church property—Trusts for charitable uses—Parol evidence of—Church canons as evidence—Such trusts cognizable by courts—Each piece of church property held upon separate trust—Individual assignment of archbishop to pay debts—What passes—Unincorporated beneficiaries of church property—What standing in court—Effect of changes in membership—Identity of congregation, etc.—Nature of interest of in church property—Advances by trustee to improve trust property—Claim for passes to assignee—Power of trustee to charge trust property for its preservation—Cross-petition in error—When to be filed.*

1. It is competent to prove by parol evidence that land conveyed to a grantee by a deed absolute on its face, is in fact held by him in trust for charitable uses, but such evidence should be clear, convincing and conclusive.
2. Where such grantee is in fact archbishop of the Roman Catholic Church for his diocese, its canons and decrees, regulating the mode of acquiring and holding church property, are competent evidence to show that the

- property so held by him is held in trust for purposes of public religious worship and other charitable uses.
3. Such a trust is one of which the courts will take cognizance and assume control for the purpose of preventing its abuse, perversion, or destruction.
  4. Where such property is held by the archbishop in trust to be devoted to the uses of public religious worship, cemeteries, orphan asylums and schools, each church, cemetery, asylum and school is held upon a separate trust and for its own separate uses, and one piece of property so held is not chargeable with any part of the expense of improving another, nor of improving church property generally in the diocese.
  5. Property held upon such trusts by the archbishop does not pass to his assignee in insolvency by a deed of assignment made in his individual capacity for the payment of his individual debts. Such an assignment passes to the assignee no better or different title to the assigned property than the assignor held, and *cestuis qui trustent* may assert, as against the assignee and the creditors of the assignor, the same rights that they could against the latter if no assignment had been made.
  6. Though the several congregations of the churches so held in trust, and the persons respectively possessing and having charge of such schools, cemeteries and asylums, are severally unincorporated and otherwise incapable of holding the legal title to the property so used, they nevertheless have such an interest in the trust property as permits them to be represented in court by a number less than the whole, having a common interest with them, for the purpose of protecting the property from seizure and sale for the satisfaction of the private debts of the trustee.
  7. Changes in the membership of such congregations and bodies do not affect their legal identity; and for the purposes of continuing and enjoying the uses to which the properties respectively possessed by them are devoted they respectively remain, in legal contemplation, the same congregations and bodies.
  8. It is not essential to the existence or enjoyment of a trust for charitable uses that the individual beneficiaries are able to show that they contributed to, or have a personal, pecuniary interest in, the trust property; their interest is measured by, and limited to, the uses for which the property is held.
  9. Where such trustee has made advances from his own private means, otherwise than as donations, to assist in buying or improving the trust property, he has a claim upon the particular property so purchased or improved which passes to his assignee in insolvency as individual assets; and in a proceeding by the assignee to subject the assets of his assignor to the payment of his debts, it is competent for the court to order an accounting of the advances so made, with a view to subjecting such property to the satisfaction of such claim.
  10. Such a trustee has power, by contract, to charge the trust property with the reasonable expense of its necessary preservation, improvement and

---

Mannix, Assignee v. Purcell *et al.*

---

repair, in favor of one who expends money, labor or materials for that purpose.

11. A defendant in error against whom, as cross-petitioner in the trial court, a judgment had been rendered which is in favor of all the other parties to the suit, and to which no error is assigned by another party, is required to file his cross-petition in error within two years after the rendition of such judgment, in order to obtain its reversal.

(Decided December 21, 1888.)

**ERROR to the District Court of Hamilton County.**

This cause comes to this court by a proceeding in error to reverse the judgment of the district court upon the following findings of fact and conclusions of law:

I. That in the year 1833, the defendant, John B. Purcell, was appointed bishop of the Roman Catholic diocese, which includes the city of Cincinnati, in this state; that afterwards, in the year 1855, he was appointed the archbishop of said diocese, and continued as such bishop or archbishop from the time of his first appointment as aforesaid until after his assignment, made in March, 1879. That his brother, Edward Purcell, came to Cincinnati in the year 1837, to be one of the Roman Catholic priests of this diocese, and was appointed as one of the priests for the congregation worshipping at the Cathedral, and was also appointed by the said archbishop as vicar-general of the diocese, and has had the general management and control of the financial matters of the said archbishop.

That, with the knowledge and acquiescence of the said archbishop, the said Edward Purcell, as soon as he came into the diocese, began to receive money on deposit, paying interest thereon and loaning it out upon interest, and continued to receive money in said business until his indebtedness, arising out of said business, became too great to pay, and he made the assignment to the plaintiff. That he assumed to have authority to do this from the said John B. Purcell, who recognized such authority, and has assumed his entire indebtedness thus created by the said Edward Purcell as his own, and for which he has acknowledged that he is liable.



II. That at the time the said John B. Purcell was appointed bishop as aforesaid, and from that time and for all the time, till he made the assignment hereinbefore named, the canons, rules and regulations governing the Roman Catholic Church of this diocese, and all its members, required that all property, land and buildings, acquired and used for ecclesiastical purposes and parochial residences, including school-houses and seminaries of learning, asylums and cemeteries, should be conveyed to the bishop or archbishop of the said diocese, by name, and his heirs and assigns forever, to be held by him in trust, for the uses and purposes for which it was acquired; and since he has been such bishop and archbishop as aforesaid, numerous churches and other institutions have been acquired in this diocese for ecclesiastical purposes, according to the form and discipline of the Roman Catholic Church, including the churches, school-houses, parochial residences, asylums, seminary and cemeteries named in the petition in this case, and the same when acquired were conveyed by deed to the said John B. Purcell, his heirs and assigns, by reason of the said rules of the said church requiring it.

III. That the said John B. Purcell, being unable to pay his debts, on the 4th of March, 1879, conveyed certain specific real estate, including some of the lots named in the petition in this case, to his brother, Edward Purcell, to enable him to pay the debts incurred by him on account of the said John B. Purcell; and on the same day the said Edward Purcell did convey the same and all his own property to the plaintiff, in trust, for the payment of said debts; and on the 11th of March, 1879, the said John B. Purcell also made an assignment to the plaintiff, in trust, for the payment of his debts, of all his property which could by law or in equity be subjected to the payment of his debts; but said assignment did not include, nor was it intended to include any property held by the said John B. Purcell, in trust, for others; and said instrument of assignment also recited that all the debts contracted by his brother were contracted on his account, for which he was morally and legally bound, and that all the debts were intended to be covered by this assignment without discrimina-

tion. That said last named deed of assignment did not enumerate any specific property, but at the time it was made the said John B. Purcell held the legal title, by conveyances to him, his heirs and assigns, of the lots of land with the churches and other institutions thereon, which are named in the petition, and at the same time was the owner of property, which had been devised or deeded to him unaffected by any trust, and could be in law and equity subjected to the payment of his debts.

IV. That all the churches, institutions, and other properties named in the petition are situated in the Roman Catholic diocese of Cincinnati.

V. That the canons, rules and regulations existing for the government of the Roman Catholic Church and all its members in said diocese, and in force therein during the time when the said churches, institutions and other property were acquired, required that all churches acquired by the gifts, donations and contributions of the members of the several congregations worshipping therein and others; and all asylums, seminaries, cemeteries and other property acquired and used for ecclesiastical and charitable purposes, acquired by the gifts, devises and contributions of the friends of said institutions and others charitably disposed, to be deeded to the said John B. Purcell, the bishop of the diocese, his heirs and assigns, and that the said churches and other institutions above named were thus deeded to the said John B. Purcell, his heirs and assigns, by reason of said rules and regulations, and for no other reason, and that the said John B. Purcell held the same in trust for the uses and purposes for which they were acquired.

VI. That the several churches, known as the Holy Trinity Church, St. Mary's Church, St. Anthony's Church, St. John's Church, St. Philomena's Church, the Church of the Atonement, St. Michael's Church, and the land on which they are situated, named in the petition, were severally bought, built and paid for by the gifts and contributions of the members of the several congregations worshipping therein, respectively, and others, for the purpose of a church, where public worship might be held according to the forms, doctrine and discipline of the

Roman Catholic Church ; that they were severally conveyed to the said John B. Purcell, his heirs and assigns, because the rules and regulations of the said church required them to be so conveyed ; that neither the said John B. Purcell, nor his brother, Edward Purcell, contributed any money or other pecuniary aid towards them which has not been repaid ; that as to the said churches, known as the St. Mary's and the St. John's, the said John B. Purcell, as archbishop, before the assignment to the plaintiff, by instruments in writing duly executed, executed declarations of trust, reciting that he held said churches in trust for the several congregations who occupied them.

VII. That the said church, known as the St. Patrick's Church, on the corner of Third and Mill streets, in Cincinnati, and St. Patrick's Church, in Cumminsville, were bought, built and paid for, except as hereinafter named, by the gifts of the members of said congregations worshipping therein, and others, for the purpose of a church where public worship might be held according to the forms, doctrine and discipline of the Roman Catholic Church ; but the same were conveyed to the said John B. Purcell, his heirs and assigns, because the rules and regulations of the said church required them to be so conveyed. That either the said John B. Purcell or his brother Edward Purcell advanced, by way of loan, money to aid in the purchase or building of each of said churches ; and the court find that the money advanced to aid the building of St. Patrick's Church, in Cumminsville, has not been repaid, but are unable to state the amount due ; and as to the money advanced in the purchase of the St. Patrick's Church in Cincinnati, the court was unable to state whether it has been repaid or not.

VIII. That the cathedral and parsonage attached were bought and built by the said John B. Purcell, bishop of said diocese, for the purpose of a cathedral for said diocese and for the use of a congregation worshipping therein ; but he took the title to said property in his own name, because the rules and regulations of the Roman Catholic Church for said diocese so required ; that at the time of such purchase he intended, and so declared his intent, that it was for a cathedral for the whole diocese ; that at the time he bought he solicited and received

large sums of money, given him for the purpose of building said cathedral; that he caused it to be consecrated as such in 1845, and to be used as a place for public worship for a congregation worshipping therein according to the forms, doctrine and discipline of the Roman Catholic Church, and the court find that he held the same in trust for the uses and purposes for which it was acquired; but that in purchasing and building the said cathedral the said John B. Purcell, or his brother, advanced large sums of money, which have not been entirely repaid, but the court is unable to state the amount now due on account of such advances.

The several congregations occupying the said churches were composed of men, women and children of the Roman Catholic faith, worshipping therein and there receiving the sacraments.

They were not incorporated nor organized under any statute of the state, nor unincorporated associations where the members incurred any personal liability. They were not separated by territorial limits, though catholics were usually expected to attend the church nearest their residence, but could change from one church to another by a change of residence, and for other reasons, or even caprice. Taking a pew and paying the pew rates by a Roman Catholic would constitute such a person a member of the congregation. Leaving the church and going elsewhere he would cease to be a member.

The churches were open to all for public worship, the poor as well as the rich having a right to attend free of cost.

There were trustees chosen annually for some of said churches, and men over twenty-one years of age, and renting pews, could vote in the choice of trustees.

The pastor of the congregation was appointed by the bishop and removable at his pleasure; but his salary was paid by the congregation, and the pastor for the time being, with his congregation, had the actual possession of the church.

IX. That the said Cathedral School, on the corner of Elizabeth and Mound streets, in Cincinnati, and included in the petition, was bought and built by the said Edward Purcell, for the purpose of a public school, to be kept in con-

nection with the cathedral; that the title was taken in the name of the said John B. Purcell, archbishop as aforesaid, his heirs and assigns, because the rules and regulations of the Roman Catholic Church in this diocese so required.

That said purchase was intended for a school-house, and a large proportion of the money for buying and building the same was given by the members of the cathedral congregation and others, for the purpose of a cathedral school, to be open to the public; that the said John B. Purcell received the conveyance of the said land, knowing that it was intended that he should hold it in trust for said school; that the said Edward Purcell made advances toward said school-house which have not been repaid, but the amount which is now due thereon the court are unable to state.

X. The court do further find, that one Jacob Hoffner, in the year 1852, being the owner thereof, conveyed to the said John B. Purcell, his heirs and assigns, eleven and sixty-seven one-hundredths acres of land in Cumminsville, for the purpose of an orphan asylum. That the consideration named in the deed was \$8,220, but the estimated value of said land was very much greater, but it was sold at the reduced price because it was understood to be used and was expressly conveyed for an orphan asylum. That said Hoffner, also, in consideration of the objects for which it was conveyed, remitted one-half of the \$8,220 named in the deed as the consideration of the said conveyance. The court do also find, that under the direction of Edward Purcell, and with gifts, legacies and contributions, furnished him for that purpose by the friends of the said asylum, it was built and improvements made under the care and management and at the expense of the sisters in charge, and a large number of orphans received, taken out and supported therein, under the care of a sisterhood of the Roman Catholic Church, who have constantly occupied it and had the management and control of said asylum and said orphans, for an orphan asylum; that the said John B. Purcell received the said deed from the said Hoffner with the distinct understanding that the land therein conveyed would be held by him for an orphan asylum; and did in fact hold it in trust for an or-

---

Mannix, Assignee v. Purcell *et al.*

---

phan asylum ; that the said Edward Purcell was treasurer of the said asylum, and received and held the monies, and also made advances towards it, from time to time, but whether he has been repaid all he advanced, the court is unable to say.

XI. We find, as to the claim of the cross-petitioner Benedetto Gatto, and Louis Nardini, his trustee, that they hold a mortgage, dated December 24th, 1878, given by John B. Purcell to his brother, Edward Purcell, on the orphan asylum property heretofore mentioned ; that the same was given to secure the note of John B. Purcell for \$17,005, dated December 14th, 1878, payable to the order of Edward Purcell three years after date, and endorsed by Edward Purcell to Benedetto Gatto. The consideration of said note consisted in part of money deposited with Edward Purcell in 1875, and the remainder, of loans made in June 1878, evidenced by notes, which were surrendered and the note given for the full amount.

At the time said mortgage was given, and for all the intervening time since 1854, *the said orphan asylum had been in the actual and notorious possession and occupancy of the sisters of charity*, who there maintained several hundred children and administered said charity, which was well known to the said Gatto and Nardini ; also, that the said Gatto and Nardini were members of the Roman Catholic Church.

XII. The court finds, as to St. Mary's Seminary, that one Patrick Considine, in the year 1848, then being the owner, gave a tract of land in the western part of Cincinnati for the purpose of a seminary to educate young men for the priesthood, and conveyed it by deed to the said John B. Purcell, his heirs and assigns ; that J. and J. Slevin, at their own expense, erected the main building for said seminary and presented it to the said archbishop and his successors in said office ; that the said John B. Purcell received the said conveyance of said land and building and held them in trust for the purposes and uses for which they were given ; that subsequently large additions were made to said seminary, at great expense, part of which were paid from the current receipts ; that it received many gifts, donations and legacies towards such improvements ; that Edward Purcell controlled the erection of said

building, and received the gifts contributed for that purpose; that he also made advances, the amount of which, and whether he has been repaid what he has advanced, the court are unable to state.

XIII. As to St. Joseph's Cemetery, the court finds that in 1842 one Wm. Terry and wife conveyed nineteen and twenty-two one-hundredths acres of land to Edward Purcell, who deeded one-half thereof for a German Catholic cemetery, and the other half, nine and sixty-one one-hundredths acres, he retained for a cemetery for the Roman Catholics of this diocese, called the "Old St. Joseph's;" that it was consecrated for a Roman Catholic cemetery, used as a burial place by Roman Catholics in this diocese, and is now nearly filled up with graves. That in 1853 the said John B. Purcell purchased a tract of sixty-one and thirty-one one-hundredths acres, about two miles distant, known as the "New St. Joseph's," taking the deed to himself, his heirs and assigns; that he caused a part of the same to be platted, laid out into burial lots, announced in the cathedral that he had purchased this as a cemetery for the use of catholics of this diocese, and invited them to purchase burial lots therein; and in 1854 caused a greater part thereof to be consecrated as a cemetery, and from that time persons of that faith began to purchase lots and burial permits therein; that a road ran through the tract, cutting off eight or ten acres from the residue, which had never been consecrated; that Edward Purcell, from the time of the purchase in 1853 till the assignment, had the general superintendence, employed the engineer to lay it out into lots of various sizes, appointed the sexton, fixed the price of lots, and sold the same to purchasers—sometimes at so much per lot, or so much per half lot, sometimes at so much per square foot, and sometimes in single graves—the quantity taken as a burial lot when sold by the square foot being at the option of the purchaser. He also issued certificates of ownership to the several purchasers of lots. The first kind was for a single grave, and signed by the sexton; the next kind was a certificate for a lot, or half lot, in a certain range, containing so many square feet, and signed by the superintendent. A third was in this form, viz.:

---

Mannix, Assignee v. Purcell et al.

---

*Certificate of Ownership.*—The Most Rev. J. B. Purcell, Archbishop of Cincinnati, hereby certifies that N. B., in consideration of — dollars, is the owner of a lot in St. Joseph's New Cemetery.

(Signed)

EDWARD PURCELL,

and countersigned by the sexton, as secretary; and the last form adopted was issued in the name of "the directors of the cemetery," and certified that "the purchaser, his heirs and assigns, are entitled to the use of said lot, in fee-simple, for the purpose of sepulture alone, subject, however, to the rules and regulations of the Roman Catholic Church regarding interments in consecrated ground"; that there were no directors, and the money received from the sale of lots and burial permits ever since 1842, as to the "Old St. Joseph's," and 1854 as to the "New St. Joseph's," was paid to him, except what was reserved to defray the expenses about the ground, and has been used by him as his own, for any purpose he saw fit. Of the portion of the "New St. Joseph's" that was consecrated, a narrow strip was designedly left unconsecrated and reserved for those who were not entitled to a catholic burial. A permit from some priest in the diocese was required in all cases for burial, and for those who could not afford to pay for the right of burial no charge was made. In June, 1874, Archbishop Purcell, in the petition, signed and sworn to by him in an action brought in the Hamilton County Court of Common Pleas, to enjoin the township trustees from laying out a road through the tract, alleged that he is the archbishop of the Roman Catholic Church in and for the diocese of Cincinnati, O. That as the archbishop of said diocese, under the laws governing the said Roman Catholic Church, all the property of the said church within said diocese, except such as vests in certain incorporated societies, is held by him in his own name, in trust for the sole use and benefit of the said church; that as such archbishop he holds the legal title of the following described real estate:

Here follows a description, by metes and bounds, of the "New St. Joseph's" Cemetery; and the deed of John Terry



and wife to J. B. Purcell, dated November 22, 1853, is referred to for a more particular description. Then follows the further declaration that said premises were purchased and have been used solely for the purposes of a cemetery.

XIV. The property known as the Catharine Street Cemetery, was purchased by Edward Dominick Fenwick, the Roman Catholic bishop of the diocese of Cincinnati, and the immediate predecessor in the said office of bishop of John B. Purcell, for a cemetery. The said Fenwick died in the year 1832, leaving a will duly executed and dated July 3, 1830, which was duly probated. By said will, said Fenwick devised and bequeathed said Catharine Street Cemetery, together with other property, to trustees in trust; that the trustees aforesaid shall, as soon as a Roman Catholic bishop for the diocese of Cincinnati shall have been canonically appointed and consecrated, convey to him said Catharine Street Cemetery property. John B. Purcell was the next Roman Catholic bishop canonically appointed and consecrated. Immediately thereafter said trustees did grant, give, sell, convey, release and confirm to the Right Rev. John B. Purcell, Roman Catholic bishop of the diocese of Cincinnati, canonically appointed and consecrated, and the immediate successor in the said office of bishop of the said Edward D. Fenwick, the said Catharine Street Cemetery tract. *Habendum*, "To have and to hold the same and every part and parcel thereof to him, the said John B. Purcell, bishop as aforesaid, and his heirs forever, for the uses and purposes of the said church."

XV. The "Old St. Joseph's" Cemetery, on the tax duplicate of Hamilton county, has been exempted from taxation since 1844, as being a graveyard.

XVI. The whole sixty-acre tract known as the "New St. Joseph's" Cemetery was exempted from taxation, as being a burial place, since 1854.

XVII. In 1859 the larger part, about fifty acres east of the road, was on the tax duplicate for taxation, but has been exempted from taxation since 1862, as being a graveyard.

XVIII. The court also finds that said John B. Purcell assigned the revenues of the "Old" and "New St. Joseph's" cemeteries to certain trustees, in a deed of trust made for the payment of his debts before this assignment, and afterwards canceled.

XIX. After the assignment of John B. Purcell and Edward Purcell, and prior to September 1st, 1880, the income and revenues of the "Old" and "New St. Joseph's" cemeteries were paid to John B. Mannix, assignee, and he still holds the same.

The amount paid Mr. Mannix by Eugene Sullivan, sexton, during said time, was \$9,631 39-100.

The amount collected by said Mannix himself during that time was — dollars, at least \$2,000.

XX. The St. Joseph's Cemetery Association was not organized or incorporated until August, 1880, after the assignment.

XXI. And, in addition, the court further finds the following facts, which were agreed to be true by the assignee and his counsel on the one side, and the St. Joseph's Cemetery and its counsel on the other side: That there was sufficient money realized from the sales of burial lots and graves in the Catharine street burying-ground, prior to the purchase of the "Old St. Joseph's" Cemetery, to pay the original purchase-price of both the said Catharine street burying-ground and the "Old St. Joseph's" Cemetery, over and above all other outlays made on account of said Catharine street burying-ground.

XXII. That subsequent to the purchase of the "Old St. Joseph's" Cemetery and prior to the purchase of the "New [present] St. Joseph's" Cemetery a sufficient sum had been realized from the sale of lots and graves in the "Old St. Joseph's" Cemetery to pay the original cost of the "Old St. Joseph's" Cemetery and all improvements thereon, and left a surplus much more than sufficient to pay for the "New St. Joseph's" Cemetery, which surplus sums were paid to Edward Purcell, as representative of John B. Purcell.

XXIII. That in the year 1835, and prior thereto, it was common for farmers and others throughout the state to have

private or family burying-grounds on their premises, many of which did not exceed fifty dollars in value.

XXIV. The title to the property described in the answer and cross-petition of the St. Joseph's Cemetery Association, known as the "New St. Joseph's" Cemetery, was conveyed to John B. Purcell, archbishop of Cincinnati, and the part known as the "Old St. Joseph's" Cemetery to Edward Purcell, in fee-simple, and many years before the deeds of assignment executed by them to John B. Mannix, respectively, and so remained until and at the time of the said assignments subject to conveyances of lots for interment purpose, as herein-after stated.

XXV. At the date of said assignment said John B. Purcell was, and ever since has remained justly indebted to divers persons in divers sums, amounting in all to more than three and one-half million dollars, of which there have been presented and proper proof has been made to the assignee to the extent of more than two and one-half million dollars.

XXVI. By the rules of the Roman Catholic Church only catholics dying in the communion of the church are permitted to be buried in consecrated ground.

XXVII. The petition in case No. 43,887, Hamilton County Common Pleas Court, shall be taken to be the same in all respects as the copy here produced, and was sworn to by John B. Purcell, as appears in said copy.

XXVIII. The portion of the "New St. Joseph's" Cemetery west of the road mentioned in the petition of John B. Purcell in 43,887, and sought to be by said petition enjoined from being made a public road, has never been consecrated as a cemetery, and no interments have been made therein, but it has been used and cultivated by the sexton as a part of his compensation as sexton.

XXIX. At date of assignment not over one-third of the "New St. Joseph's" Cemetery, but nearly all of the "Old St. Joseph's" Cemetery, had been actually used or occupied for burial purposes, and burial rights in writing had been granted by deed and otherwise to divers lot-holders to the extent aforesaid.

---

Mannix, Assignee v. Purcell *et al.*

---

XXX. The mortgage dated January 20, 1879, from John B. Purcell to P. A. Quinn and others, in trust, recorded same day in book 420, page 223, Hamilton county records, was executed, as appears on its face, and may be offered in evidence subject to proper exceptions.

XXXI. Previous to the purchase of the "Old St. Joseph's" Cemetery, John B. Purcell announced that he would have to purchase other grounds for a cemetery, on account of being obliged to give up the Catharine Street Cemetery. Soon after the purchase of the "Old St. Joseph's" Cemetery, in 1842, he announced that he had purchased the same and set it apart as the cemetery of the Roman Catholics of his diocese. Thereupon members of the Roman Catholic Church commenced the purchase of lots and graves therein, the whole of which had been previously consecrated.

XXXII. The court find that on the 26th day of November, 1878, Edward Purcell, as the agent of said John B. Purcell, made, executed and delivered to Henry Bokop, for \$5,965 loaned, the note as follows, to-wit :

No 1. CINCINNATI, *November 26th*, 1878.

The archbishop of Cincinnati promises to pay, one year after date, to the order of Henry Bokop, five thousand nine hundred and sixty-five dollars, for value received, with six per cent. interest for one year only.

(Signed)

JOHN B. PURCELL.

\$5,965.00.

Edward Purcell.

That there was paid on said note fifty dollars on February 6th, 1879, and there have been no other or further payments thereon. That there is due thereon \$5,915.00, with interest. That at the date of said note, and for a long period prior thereto, John B. Purcell was archbishop of the diocese of Cincinnati, and the said Edward Purcell was his agent, with full power to do and transact the financial business of John B. Purcell as the archbishop of said diocese.

XXXIII. That Patrick Brannan, a creditor of the said John B. Purcell, before the commencement of this proceeding, filed in the Common Pleas Court of Hamilton County a bill

in behalf of himself and such creditors as might join under section 6345 of the Revised Statutes, to set aside the deed hereinbefore referred to, made March 4th, 1879, by John B. Purcell, to the said Edward Purcell, on the ground that it was fraudulent as to creditors. That the said Jefferson National Bank of Steubenville, and the First National Bank of Covington, who had severally discounted the notes of the said John B. Purcell, indorsed by Edward Purcell, and were creditors of the said John B. Purcell, and had severally recovered judgments against him on said notes, have become parties to the said proceedings of the said Patrick Brannan, praying for the same relief, and such proceeding is now pending in the Supreme Court of Ohio.

XXXIV. That the defendant, John G. Hendricks, another creditor of the said John B. Purcell, has recovered judgment by default against him in the sum of \$39,327, composed of sundry items, for paving around the cathedral and putting on a new tin roof, and the greater part for the proceeds of certain U. S. Government bonds deposited with Edward Purcell, and by him sold and the proceeds credited on a pass-book to said Hendricks as so much money on deposit.

And as conclusions of law the court find, that at the time of the assignment to the plaintiff, the said John B. Purcell, holding the said property named in the foregoing articles of this finding, except the St. Joseph's Cemeteries, in trust for religious and charitable uses, the same did not pass to the plaintiff by the said instrument of assignment, nor can the said assignee subject it to the payment of the debts referred to and included in the said assignment; but as to the said churches and other properties known as the Church of St. Patrick's, on the corner of Third and Mill streets; the Church of St. Patrick's, in Cumminsville; the Cathedral; the Cathedral School; the Orphan Asylum and the Mt. St. Mary's Seminary, the said assignee is entitled to recover whatever sums of money, if any, have been advanced by the said John B. Purcell or Edward Purcell, for buying or building, or to aid in buying or building any of said churches or other properties, or improving, repair-

ing, insuring, or for taxes or other purposes, and has not been repaid; and unless the said parties can agree as to the amounts, if any, due from the said several churches and other institutions last above named, the said matter be referred to a master to ascertain the amount due the said John B. Purcell, or Edward Purcell, on account of advances to any of said churches or other property; but as to the other churches—the Holy Trinity, St. Anthony's, St. Michael's, St. Mary's, St. John's, Church of the Atonement, and St. Philomena's—the petition should be dismissed with costs.

And as a further conclusion of law, the court find that as to the several claims of Henry Bokop, Patrick Brannan, the Jefferson National Bank of Steubenville, the First National Bank of Covington, John G. Hendricks, and Louisa Sturoff, the equity of the case is against them and with the defendants, and as to them and each of them, their answer and cross-petition be dismissed.

And that the said mortgage made by the said John B. Purcell to Edward Purcell, and by him assigned to the said Louis Nardini in trust, is not a lien upon said orphan asylum.

The court also finds as a conclusion of law, that so much of the "New St. Joseph's" Cemetery as has not been sold into burial lots, or otherwise appropriated to the burial of the dead, as is reasonably practicable to be separated from the residue and sold, is subject to sale by the assignee for the payment of debts under the assignment; and unless the parties can agree upon the quantity of ground that may be thus sold, the said master above named shall ascertain the quantity and report to the court, and that the fund on hand received for the sale of said lots of ground in the cemetery for burial purposes since the assignment, and which has not been expended for improvements, belongs to the plaintiff as assignee; and that the claim and rights of said assignee are not affected by the organization of the St. Joseph's Cemetery Association since the assignment.

And the court having found that as to the claim of Henry Bokop, Patrick Brannan, the Jefferson National Bank of Steubenville, the First National Bank of Covington, John G.

Hendricks, Louisa Sturoff, the equity of the case is with the defendants, the said parties representing the said congregations and other charitable and educational institutions; and as to the defendants herein last named, and each of them, their answers and cross-petitions be dismissed at the cost of each defendant for the costs made by him.

That as to the mortgage of Benedetto Gatto set up in his cross-petition, and in the cross-petition of Louis Nardini, his trustee, the equity of the case is with the defendants, the St. Peter's and St. Joseph's Orphan Asylums, and that he is not entitled to recover his said claim or any part thereof in this suit, and that their cross-petitions be dismissed with costs; the costs for which each defendant shall be liable being only the costs incurred by each in maintaining the issue on his part.

The court does further order, adjudge and decree that if the parties shall not be able to agree upon the amounts, if any, due from the congregation of the St. Patrick's of Mill street, St. Patrick's of Cumminsville, the cathedral congregation for the Cathedral and Cathedral School, the St. Peter's and St. Joseph's Orphan Asylums, and the Seminary of Mount St. Mary of the West, and the amount of ground unsold in the cemetery of St. Joseph, that the said master proceed to find what, if anything, was due J. B. Purcell from each of the congregations and institutions at the time of the assignment to the plaintiff, and the amount of the ground still unsold; that in so doing all the evidence before the court at the hearing, and such other competent evidence as any of the said congregations or other institutions or any party may offer, be received by him, and that such parts thereof be examined as he is referred to, and that he make his report at as early a time as may be.

And the court appoints Alexander B. Huston as master to hear and determine the several matters above set forth; and that he find what other indebtedness for borrowed money there was due to other parties from such last named churches and institutions, and any other fact claimed to have a legal bearing upon such indebtedness.

And to each of the conclusions of law above stated, and to the decree, the following parties thereupon severally excepted, namely: John B. Mannix, the plaintiff, the defendants John G. Hendricks, Louisa Sturoff, the First National Bank of Covington, Ky., the Jefferson National Bank of Steubenville, the defendant, the St. Joseph's Cemetery Association and the defendant Henry Bokop, and likewise the said Benedetto Gatto and Louis Nardini, trustee, except to each of the conclusions of law above stated, and to the decree.

That as to so much of the decree as finds that there may be anything due from the Cathedral, the Cathedral School, the St. Peter's and St. Joseph's Orphan Asylums, the Seminary of Mount St. Mary of the West, the congregation of St. Patrick's of Mill street, and refers the same to a master to ascertain the same, in each case, the several parties representing said institutions except. And the several parties, having filed motions for a new trial, presented a bill of exceptions, which is signed, sealed and allowed by the court, and ordered to be recorded.

*S. A. Miller, Hoadly, Johnson & Colston, Mannix & Cosgrave, Stallo & Kittredge and Wilby & Wald*, for the assignee and creditors.

We contend the whole Catholic Church is concluded by the declarations of Archbishop and Edward Purcell as to the title to the property. That in the face of the deeds and their declarations, no trust can attach to the property to defeat a creditor. We claim parol evidence is inadmissible to show any trust relating to the property. Eng. Stat. Frauds, sec. 7; Perry on Trusts, sec. 78; *Hennessy v. Walsh*, 55 N. H. 515; *Miller v. Stokeley*, 5 Ohio St. 194; *Fleming v. Donahoe*, 5 Ohio, 255; *Stall v. Cincinnati*, 16 Ohio St. 174; *Mathew v. Leaman*, 24 Ohio St. 623.

We think we may look in vain to find any established division of trusts under which the trust, if one exists in this action, may be classed; for there is no direct or express trust, no implied trust, no resulting trust, no constructive trust. *Attorney-General v. Manufacturing Company*, 14 Gray, 586; Perry on



Trusts, sec. 732; *Kain v. Gibbony*, 101 U. S. 362; *Baptist Association v. Hart*, 4 Wheaton, 1; *Gallego v. Attorney-General*, 3 Leigh, 450; *Wheeler v. Smith*, 9 Howard, 55; *McLaughlin v. College*, Western Reporter, vol. ii, 425.

John B. Purcell contracted the debt officially, as bishop and archbishop, and it is a diocesan debt. He held the title in fee-simple, not only as appears on the face of the deeds, but as understood by him, and as required by the laws of the church.

There is no decision in any of the numerous cases involving the title and possession of Catholic Church property found in the reports of the higher courts of any of the states which tends to sustain the claim of defendants. See *Chatard v. Donovan*, 80 Ind. 20; *Stack v. O'Hara*, 98 Pa. St. 213; *Smith v. Bonhoof*, 2 Mich. 115; *Hennessy v. Walsh*, 55 N. H. 515.

If one desired to give his property to a bishop for the purpose of serving God, as taught by his religious faith, and believed that he could best accomplish his purpose by making an absolute gift to the bishop, the title so bestowed would not be incumbered with the trust which the donor did not attach to the gift. *American Tract Society v. Atwater*, 30 Ohio St. 77.

Ignorance of the law furnishes no ground to set aside the solemn acts of the parties, nor will equity furnish any relief where the facts are equally known to them. Story's Eq., sec. 113; Perry on Trusts, sec. 184.

The canon law is not admissible in evidence to show by what tenure real property is held in the state of Ohio. Neither is the Roman Catholic Church a voluntary association for benevolent or charitable purposes.

The title to real estate in Ohio is held under statutory law. The Roman Catholic Church is not a voluntary association, established for benevolent and charitable purposes, but it is an ecclesiastical institution, and its rules and regulations, or its canon law, are not admissible in evidence in a court of justice, except when an ecclesiastical right is at issue between the litigants. Voluntary associations for benevolent and charitable purposes are within the special provisions of the statute, and courts can and will administer the trusts, and hence, their rules and stipulations become admissible in evidence, and are

---

Mannix, Assignee v. Purcell et al.

---

not unfrequently of controlling importance; but the courts can not administer ecclesiasticism, and, hence, there is no comparison to be made between the Roman Catholic Church and a benevolent or charitable association.

*Lincoln, Stephens & Lincoln* and *Mathews, Ramsey & Mathews*, for all the other churches and institutions.

A trust may be proved by parol. *Perry on Trusts*, sec. 75; *Mathews v. Leaman*, 24 Ohio St. 715; *Morice v. Bishop of Durham*, 9 Ves. 404; *Fleming v. Donahoe*, 5 Ohio, 256; *Osterman v. Baldwin*, 6 Wall, 116.

The property in question was held in trust, as shown by the evidence of Bishop Purcell and other prelates of the church, the statutes of the diocese, and the canons of the church. See *Canons*, 187, 195, etc.

The trust was one for each congregation, as shown by the evidence. The congregations are the *cestuis que trustent*. *Pres. Cong. v. Johnston*, 1 Watts. & Serg. 46; *Martin v. McCord*, 5 Watts. 493; *Syler v. Eckart*, 1 Binn. 378; *Witman v. Lex*, 17 Serg. & Rawle, 93; *Unangst v. Shortz*, 5 Wharton, 519; *African M. E. Church v. Conover*, 27 N. J. Eq. 158; *Beatty v. Kurtz*, 2 Pet. 578; 3 Peters, 500; *Strong's Lectures*, 65, 71.

The pastor is not the agent of the bishop. *Rose v. Vertin*, 46 Mich. 458; *Twigg v. Sheehan*, 101 Pa. St. 370; *O'Hara v. Stock*, 90 Pa. St. 491; *Leahey v. Williams*, 141 Mass. 356; *Twigg v. Tracy*, 104 Pa. St. 500.

John B. Purcell, as archbishop of the diocese, held the churches in trust for the congregations building and worshipping in them. Where the conveyance is to a known religious denomination or congregation, the trust is certain. *Hale v. Everett*, 53 N. H. 70; *Att'y-Gen. v. Shore*, 7 Sim. 309; *Miler v. Goble*, 2 Denio, 492; *Robertson v. Bullions*, 9 Barb. 64; *Parish of Bellport v. Tooker*, 29 Barb. 256; *Petty v. Tooker*, 21 N. Y. 267; *Strong's Lectures*, 71.

Property held in trust does not pass by a general assignment for the benefit of creditors. *Perry on Trusts*, secs. 334,

335; *Ludwig v. Highley*, 5 Barr, 139; 55 Maine, 580; Strong's Lectures, 71 to 76; 67 Pa. St. 146; 60 Mo. 590; 41 Pa. St. 16; 17 Serg. & Rawle, 91; 69 Pa. St. 467; 84 Pa. St. 291; 1 Ohio St. 164; 2 Ohio St. 581.

The debt was not a debt of the trust. It grew out of the "banking business;" a business wholly foreign to the relations born by the bishop to the church.

The fact that the property was in the name of John B. Purcell, gives the assignee no peculiar equity. *McGovern v. Knox*, 21 Ohio St. 547; *Ludwig v. Highley*, *supra*.

These were unincorporated public charities. The practice in all such cases is to permit parties connected therewith to appear and defend the same; *Beatty v. Kurtz*, 2 Pets. 585; Story Eq. Pl., sec. 114-121; *Milligan v. Mitchell*, 3 My. & Cr. 72-84.

The court will protect these charities if it can. Many gifts for such charities were made, and the property was purchased and paid for by such gifts. Such charities are always highly favored in law. *Zanesville Canal & Mfg. Co. v. Zanesville*, 20 Ohio, 488; *Sowers v. Cyrenus*, 39 Ohio St. 35; *Urmey's Ex. v. Wooden*, 1 Ohio St. 163; *Jackson v. Phillips*, 14 Allen, 550; *Odell v. Odell*, 10 Allen, 5, 6; *Witman v. Lex*, 17 Serg. & R. 91; *Trustees of McIntyre v. Zanesville C. Co.*, 9 Ohio, 287; *Smart v. Bradstock*, 7 Beav. 500.

Title may be conveyed to an unincorporated society by name—in other words, it is not necessary that there should be a donee, known as such to the law. *Beatty v. Kurtz*, *supra*.

The particular *cestuis que trustent* are not known or ascertained. The person or persons appearing to defend the charity, may not be of the class even of beneficiaries named in the gift creating it.

The statute of limitations does not run against it in equity. *College of St. Mary Mag. v. Att'y-Gen.*, 6 H. L. C. 207.

The congregations were in possession of their property and in the continued use of it, and the statute would not run as against them and in favor of Archbishop Purcell. Wood on

---

Mannix, Assignee v. Purcell et al.

---

Limitations, p. 414 ; *College of St. Mary Mag. v. Att'y-Gen.*, 6 H. L. C. 205.

The doctrine of perpetuities has no application thereto. It may hold forever. *College of St. Mary Mag. v. Att'y-Gen.*, 6 H. L. C. 207 ; *Odell v. Odell*, 10 Allen, 6 ; *Jackson v. Phillips*, 14 Allen, 550 ; *Perin v. Carey*, 25 How. 507 ; *Perry on Trusts*, sec. 736.

In private trusts, the donee must be ascertained within the period allowed by the law against perpetuities, or the trust will be void, and a resulting trust will arise in favor of the heirs ; whereas the individual persons to be benefited by a charitable trust, are not ascertained, nor is there any such thing known as a resulting trust to the heir in such cases, or for breach or failure of the trust. *Perry on Trusts*, sec. 144-156 ; *Jackson v. Phillips*, 14 Allen, 550.

The law as to accumulations does not apply to charitable trusts. *Perry on Trusts*, sec. 738 ; *Jackson v. Phillips*, 14 Allen, 550.

Although trustees are especially named in a charitable trust, a majority may act, which is not the case with trustees of a private trust. *Perry on Trusts*, sec. 413.

And the court may appoint their successors. 1 *Perry on Trusts*, sec. 287. *Attorney-Gen. v. Shore*, 1 Mylne & Cr. 400.

*I. W. Goss*, for St. Michael's Congregation.

I. Our first proposition is, that from the finding of facts, equity raises a trust in favor of the congregation, and by the congregation we mean the organized body of that name, and not the individuals thereof taken separately. *Calkins v. Chaney*, 92 Ill. 461. For the law as to resulting trusts, see : *Story's Equity Jurisprudence*, sec. 1201, and *Perry on Trusts*, sec. 124, et seq. ; *Creed v. Lancaster Bank*, 1 Ohio St. 1 ; *Williams v. Van Tuyl*, 2 Ohio St. 336 ; *McGovern v. Knox*, 21 Ohio St. 551 ; *Dudley v. Bosworth*, 10 Humphreys, 12 ; *Gomez v. Tradesman's Bank*, 4 Sandf. 106 ; *Baptist Church v. Yates*, 1 Hoffman's Chy. 142 ; *Church v. Sterling*, 16 Conn. 388 ; *Perry on Trusts*, sec. 127.

II. It is claimed that this congregation is unincorporated, and is not, therefore, such an entity as can have any standing in law or equity. The objection is disposed of by *Williams v. First Presb. Church*, 1 Ohio St. 479; *Trustees, etc. v. Z., C. & M. Co.*, 9 Ohio, 287; *Phipps v. Jones*, 20 Pa. St. 260; *Horton v. Baptist Church*, 34 Vt. 309; *Vestry v. Chantey*, 3 McCord. 317; *Witman v. Lex*, 17 Serg. & Rawle, 88; *Keller v. Tracy*, 11 Iowa, 530; *Inglis v. Sailors' Snug Harbor*, 3 Peters, 99; *Beatty & Richy v. Kurtz*, 2 Id. 584; *De Voss v. Gray*, 22 Ohio St. 159; and *Perry on Trusts*, sec. 45.

III. A deed, absolute on its face, may be shown by parol evidence to be in fact a trust, is no longer open to discussion in Ohio. *Mathews v. Leaman*, 24 Ohio St. 615; *Broadrup v. Woodman*, 27 Id. 553. The trust may be established by circumstantial evidence. *Fleming v. Donahoe*, 5 Ohio, 255; *Miller v. Stockly*, 5 Ohio St. 195.

The possession of the congregation was such as to charge all persons with notice of their equitable interest, or of that of the church at large. *McKenzie v. Perrill*, 15 Ohio St. 162.

*Thos. A. Logan and Logan & Slattery*, for Louis Nardini, trustee.

Since the hearing of the motion for postponement in this court, upon December 16th, the counsel for the assignees, the plaintiffs in error, has consented that a cross-petition in error shall be filed by Nardini in both cases, and it has been filed accordingly. The omission, if any there was, has thereby been waived, so far as they are concerned. *King v. Penn*, 43 Ohio St. 57. But I claim that it was not necessary for them to file any cross-petition in error. Those which have been filed by consent, have been filed out of excess of caution. When John B. Mannix began his action below, Gatto and Nardini were properly made parties defendant thereto. They were necessary parties then. "When an assignee brings suit for the construction of the terms of the assignment, all parties interested in the estate are necessary parties." *Burrill on Assignments*, 5th ed. 682. Mannix filed his petition in error in this court within the statutory period, to which again Gatto

---

Mannix, Assignee v. Purcell et al.

---

and Nardini were properly made defendants. Summons in error was duly served upon them. This court thereby acquired jurisdiction of them, and of the whole case, which, being here properly as to one, is here properly as to all. The precise question has been decided in *Buckingham v. The Commercial Bank*, 21 Ohio St. 131; *Secor v. Winter*, 39 Ohio St. 218; *Meese v. Keefe*, 10 Ohio St. 362; *Bradford v. Andrews*, 20 Ohio St. 208. If the property assigned by the archbishop to Mannix passed by the deed of assignment, then: "The assignee holds it in trust for the benefit of all the creditors, whether they are specifically before the court or not, and such decree will be made as will protect the rights of all equally." *Stanton v. Keys*, 14 Ohio St. 443; *Doremus v. O'Hara*, 1 Ohio St. 45; *Hyde v. Olds*, 12 Ohio St. 591; *Hallowell v. Bayliss*, 10 Ohio St. 536. This court will permit a cross-petition in error to be filed now, if it is deemed necessary. *Nations v. Johnson*, 34 How. N. S. 195.

[On the other propositions in the case, counsel cited substantially the same authorities as counsel for plaintiffs in error.]

*Yaple, Moos & McCabe*, for St. Mary's Congregation.

In Ohio, an express trust may be ingrafted upon an absolute deed in fee, by parol. *Mathews v. Leaman*, 24 Ohio St. 615; *Broadrup v. Woodman*, 27 Ohio St. 553, 559; *Harvey v. Gardner*, 41 Ohio St. 642, 646, 647.

This was so at common law, which was only changed by the seventh section of the Statute of Frauds, 41 Ohio St. 647, and cases cited, and 2 Whart. Ev. §§ 903, 1031, 1034, 1036; 2 Washb. Real Prop., pp. 50, 51 (4th ed.); *French v. Griswold*, 40 Ia. 484; *Dark v. Williamson*, 25 Bev. Chy. 622.

To enable any creditors, or the assignee who represents them, to charge such property as this, or any other congregation, for the debts of the Purcells, *the very money loaned to them*, or either of them, must have gone into such property, and it must be clearly traced and proven to have been so invested. *Ferris v. Van Vechten*, 71 N. Y. 113.

So far as property questions are concerned, the law of Ohio

governs the case entirely, and the canon law is a nullity, being a foreign law. *Nowler v. Coit*, 1 Ohio, 519.

If the congregations are nothing, as the plaintiff's counsel claim, the deeds in evidence, which are expressed to be in trust for certain congregations, whose property is not sought to be subjected, would simply be deeds declaring trusts in favor of nobody—nothing—therefore void for want of a beneficiary; and all such property would stand upon the same legal footing as to liability for the debts of the archbishop as that to which no declaration of trust has been made. Such "congregation" is as definite as "poor children in the town of Zanesville." 17 Ohio St. 352; 9 Ohio, 203—McIntire's Will.

By nothing that he said or did, did J. B. Purcell bind or create a lien upon any of this real estate to or in favor of any creditor.

In this case, none of the creditors represented by the assignee, Mr. Mannix, ever dealt with the property held in the name of J. B. Purcell. They obtained nothing but his personal obligations—his personal liability. No real estate was charged in any way by anything said or done by him or Edward Purcell.

The dealings and incurring of their debts by the archbishop and Father Edward Purcell in no way bound this congregation or its property rights, or the rights therein of any member of the orthodox Catholic Church in good standing regularly worshipping there, either in law or equity. *De Voss v. Gray*, 22 Ohio St. 159.

The assignee stands, in this case, simply and precisely in the shoes of the assignor, J. B. Purcell, and takes the property subject to all the equitable right of others therein which they could have asserted against the assignor, and which he could not have taken away from them, if he had made no assignment but had personally brought an action against them to sell the property to pay his own debts. *Gibson v. Warden*, 14 Wal., at p. 248, and cases there cited; 2 Superior Court R., at p. 307; Bump on Bankruptcy, 9th ed., p. 497; *Adams v. Collier*, 122 U. S. 382, and cases cited; *Id.*, p. 391.

---

Mannix, Assignee v. Purcell et al.

---

*Oliver, Murray & Benedict*, for the St. Joseph's Cemeteries.

John B. Purcell held the lands in controversy upon an *express trust* for pious and charitable uses. Although the lands about which the trust is now concerned, which are the lands in controversy, are not the same lands, still the trust is the same identical trust. *Attorney-General v. South Sea Co.*, 4 Beav. 458; *Aleman v. Weisinger*, 40 Cal. 288; Smith, Manual of Eq., sec. 51; Spence's Equity, vol. 2, p. 204; *Wilcocks v. Wilcocks*, 2 White & Tudor, L. C. in Eq., 4 Am. Ed. 833.

An express trust may be attached by *parol* to a conveyance absolute on its face. *Flemming v. Donohue*, 5 Ohio, 154; *Miller v. Stokely*, 5 Ohio St. 194; *Stall v. Cincinnati*, 10 Ohio St. 170; *Matthews et al. v. Leaman et al.*, 24 Ohio St. 615, 623; *Broadrup et al. v. Woodman et al.*, 27 Ohio St. 553.

The trust in this case is a charitable trust. A charity is a gift for an indefinite number of persons, for a proper purpose, and is permanent in duration. Perry on Trusts, sec. 697; *Jackson v. Phillips*, 14 Allen, 556. The mode of application of bounty and the selection of particular objects may be left to the trustees. *Gerke v. Purcell*, 25 Ohio St. 229, 245; *Attorney-General v. Pearce*, 2 Atk. 87-8; *Saltanstell et al. v. Sanders et al.*, 11 Allen (Mass.) 455-6-7.

Charities are not confined at the present day to those enumerated by the Statute of Elizabeth. Chancery has inherent jurisdiction independent of that statute. Perry on Trusts, sec. 694; *McIntire P. S. v. Zanesville C. & M. Co.*, 9 Ohio, 287; *Urmeys Executors v. Woodin*, 1 Ohio St. 160-4. *Public* does not mean *universal*. The beneficiaries may be confined to those of a particular town, age, sex, condition, race or society, religious or secular. *Burd's Orphan Asylum*, 90 Pa. St. 35; *Indianapolis v. Grand Master*, 25 Ind. 519; *Saltanstell v. Sanders et al.*, 11 Allen, 455.

Compensation *exacted* does not make a use more or less public; or more or less charitable; this depends upon the object and purpose for which the compensation is made. *Gerke v. Purcell*, 25 Ohio St. 229, 247.

The trust in this case is not void for uncertainty. *Sowers v. Cyrenius*, 39 Ohio St. 29.



A gift need not be called charitable to make it charitable. Perry on Trusts, sec. 396.

It is not necessary to a charity that *any one* shall have the *legal right* to demand admittance to its benefits. *McDonald v. Massachusetts General Hospital*, 120 Mass. 435.

Reasonable discretion may be vested in trustees of charities as to internal regulations for the purpose of carrying out the charity and promoting it. When the regulations tend to destroy the trust or divert the fund, such abuse may be corrected by a court of equity. *McDonald v. Mass. Gen. Hosp.*, 120 Mass. 435.

It is immaterial from what source the funds are derived which constitute the trust. Perry on Trusts, § 707.

It is no valid objection to a grant or devise to a charitable use that it creates a perpetuity, or renders the estate granted or devised for the purpose inalienable. *Yard's Appeal*, 64 Pa. St. 98.

If the estate be vested, it is not in the view of the law a perpetuity, although the *purpose* for which it is granted be such that it *can not be devoted to any other use*. *Ib.*

The foregoing propositions will be found abundantly supported by the following authorities: *Jackson v. Phillips*, 14 Allen (Mass.) 556, 539, 550; Perry on Trusts, sec. 710 (distinguishes 5 Rawle, 551, and *Morning Star Lodge*, 23 Ohio St. 134, cited by Mr. Miller); sec. 732 of Perry; *Indianapolis v. Grand Master*, 25 Ind. 519; *Duke v. Fuller*, 9 N. H. 536; *Potts v. Philadelphia Asso.*, 1 Legal Gazette R. (Pa.) 369; *Att'y-General v. Pierce*, 2 Atkyns, 88, p. 276; *Saltanstell et al. v. Sander et al.*, 11 Allen (Mass.) 446, 455-6, and on page 464 distinguishes, Anon, 3 Atk. 277, and *Att'y-Gen. v. Federal St. Meeting House*, in 3 Gray, cited by Mr. Miller; *Miller v. Teachout*, 24 Ohio St. 525, 532-4; *Evangelical Asso. Appeal*, 32 Pa. St. 316; Perry on Trusts, § 710; *Thorner v. Wilson*, 3 Drewry, 245; *Ould v. The Washington Hospital*, 95 U. S. 311; *Wright v. Linn*, 9 Barr (Pa.) 438; *White v. White*, 7 Vis. 422; *Philadelphia v. Fox et al.*, 64 Pa. St. 169; *Tr. of McL. P. Sch. v. Z. C. & M. Co.*, 9 Ohio,

*Mannix, Assignee v. Purcell et al.*

303, 287; *Z. C. & M. Co. v. City of Z.*, 20 Ohio, 483; *Urmev's Ex. v. Woodin et al.*, 1 Ohio St. 160; *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201; *Sarah Zane's Will*, in *Magill v. Brown*, 1 Brightly (Pa.) 357, 407-8; *McLain v. School Directors*, 51 Pa. St. 196; *Thomas v. Ellmaker*, 1 Pars. Eq. (Pa.) 98; *Burr v. Smith*, 7 Vt. 241; *Yard's Appeal*, 64 Pa. St. 98; *Foreign Missionary Society's Appeal*, 30 Pa. St. 425; Mr. Miller relies upon the cases of *Babb v. Reid*, 5 Rawle, 151, 3 Atk. 277, Anon; and *Morning Star Lodge v. Hayslip*, 23 Ohio St. 144.

The purpose for which these lands were set apart is a charitable purpose. *Ould v. Washington Hospital*, 95 U. S. *supra*; *Evangelical Asso. Appeal*, 35 Pa. St. 316; cases in which burial grounds have been held public charities. *Beatty et al. v. Kurtz*, 2 Peters, 566, 583, approved in *City of Cincinnati v. Lessee of White*, 6 Peters, 436; and cited with approval in *Price et al. v. M. E. Church*, 4 Ohio, 515 (875); *State v. Trask*, 6 Vt. 364; *Hunter v. Trustees of Sandy Hill*, 6 Hill, 407; *First Cong. Church v. Walsh*, 57 Ill. 363; *Donohuyh's Appeal*, 86 Pa. St. 314; *Hill on Trustees*, \*453, citing *Doe v. Pitcher*, 6 Taunton, 359, 363; *Dexter v. Gardner*, 7 Allen, 247; *Swanscy v. American Bible Society*, 57 Me. 527; *Beaver v. Filson*, 8 Pa. St. 327, 335; *Trustees of McIntire Poor School v. The Zanesville Canal and Manufacturing Co.*, 9 Ohio, 287.

A charitable use is *public*. Spence's Equitable Jurisdiction of Chancery, vol. 1, p. 588, Ch. XI, § 1, and see note (d); Lewin's Law of Trusts, p. 20; Bispham's Eq. § 125, p. 171; *Hullamn v. Honcomp et al.*, 5 Ohio St. 242.

Even if John B. Purcell was originally absolute owner of the lands, he has dedicated them to charitable and pious uses. He has appropriated the lands to the use of the Roman Catholics of the diocese, and they have acted upon the appropriation in such manner that he is estopped to claim ownership. *Hunter v. Trustees*, 6 Hill (N. Y.) 411; *Village of Fulton v. Mehrenfeld*, 8 Ohio St. 445; *Cincinnati v. Lessees of White*, 6 Pet. 438; *Brown v. Manning*, 6 Ohio 129; *Price et al. v. M. E. Church*, 4 Ohio 515; *Cong. Church v. Walsh*, 57 Ill.

363; *Com. v. Wellington*, 7 Allen, 299; *Com. v. Viall*, 2 Allen, 512.

*E. W. Kittredge*, for John G. Hendricks.

I claim that Hendricks is entitled to be paid out of the general church property, under the authority conferred by the act of January 3, 1825, 2 Chase's Stat. 1460. [Mr. Kittredge also elaborated the various points made by other counsel in the case, citing substantially the same line of authorities heretofore given.—Rep.]

OWEN, C. J. 1. The case has been considered by us upon the facts found by the district court. While we have examined the evidence sufficiently to see that it tends to support these findings, we have not undertaken to determine its weight.

These facts, so far as they have engaged the consideration of this court and are involved in this opinion, may be more briefly summarized as follows :

John B. Purcell was bishop of the Roman Catholic diocese of Cincinnati from 1833 to 1855, and archbishop from that time to and after his assignment, in March, 1879. From 1837 to the time of such assignment, his brother, Edward Purcell, was priest, serving at the cathedral, and also, by appointment of the archbishop, vicar-general of the diocese, to whom was confided the general management and control of the financial affairs of the archbishop. During all the time above mentioned the canons, decrees, and rules of the Roman Catholic Church for the diocese required all property held and used for ecclesiastical purposes to be conveyed to the bishop or archbishop of the diocese by name, his heirs or assigns forever, to be held by him in trust for the uses for which it was acquired. In the manner and for the uses above stated, the churches, school houses, parochial residences, asylums, seminary and cemeteries involved in this controversy, were acquired and conveyed to "John B. Purcell, his heirs and assigns forever," because the rules and canons of the church required the legal title to be so vested, and for no other reasons. As soon as Edward Purcell came into the diocese, and in his capacity of

vicar-general, he began to receive money on deposit, (paying interest thereon) and loaning it out upon interest, all with the acquiescence of the archbishop, and so continued to receive money until the indebtedness so incurred amounted to more than \$3,500,000, which has been assumed by John B. Purcell as his own.

Finding themselves without available means to pay this indebtedness, they made an assignment in insolvency to the plaintiff, before whom about \$2,500,000 of indebtedness have been duly proved. It is only necessary to deal with the assignment of John B. Purcell. On March 11, 1879, the latter, in his individual capacity, made his assignment to Mannix in trust for the payment of his debts, of all his property which could at law or in equity be subjected to such payment, expressly excepting all property held by him in trust for others. No specific property was named or described in the deed; but in addition to the church property held in his own name, the assignor owned a large amount of property which had been deeded or devised to him unaffected by any trust, and which was legally subject to the payment of his debts, and about which there is no controversy. All the church edifices involved in this controversy, except three, (which includes the cathedral) were severally bought, built and paid for wholly by the gifts of the members of the several congregations worshipping therein, respectively, and others, for the sole purpose of public religious worship therein. To the purchase and building of the three excepted as above, John B. and Edward Purcell advanced money by way of loan, (and otherwise than as gifts), which, as to the cathedral and St. Patrick's Church in Cumminsville, has not been repaid. Except the money so advanced, these church buildings were paid for by contributions from members of the respective congregations, and others, and the legal title vested in the archbishop, to be by him held in trust for the use of the congregations, respectively, using them as places of public worship. The congregations of the several churches were composed of men, women and children of the Roman Catholic faith, worshipping and receiving the sacraments of the church therein.

These congregations were not incorporated, nor organized under any law of the state, nor were they unincorporated associations whose members incurred any personal liability; although some of them had trustees appointed for purposes other than for control over the title to church property. Members could change from one church to another by change of residence, or from mere caprice. Taking a pew and paying the pew rates by a Roman Catholic constituted such person a member of the congregation. Upon leaving the church and going elsewhere, the membership ceased. The churches were open and free to all for purposes of public worship. The pastor of each congregation was appointed by the bishop and removed at his pleasure, but his salary was paid by the congregation; and the pastor for the time being, with his congregation, had actual possession of the church. None of the congregations, nor any bodies of individuals representing them, were so organized as to be capable of holding the legal title to the church property. The other properties held and used for ecclesiastical purposes—asylums, schools, cemeteries (with the qualifying facts found by the court below concerning the property represented by the St. Joseph's Cemetery Association, a part of which was subjected to the payment of creditors), were, like the churches, openly, notoriously, continuously, and exclusively possessed and used for the purposes for which they were acquired and deeded to the archbishop. But they were so possessed, used and managed by persons with whom it was impracticable to invest the legal title, by reason of the want of permanency in the *personnel* of their possession and management.

2. The original action was brought by the assignee for the purpose of procuring a sale of all this property free of all clouds and incumbrances by reason of the assertion of the trusts and uses for which it is claimed the archbishop held it; the contention of the assignee being that (1) the debts before mentioned were not the individual debts of the archbishop, but contracted for diocesan purposes, and that the church property is justly chargeable with their payment, and this prior to all other charges upon the property; and (2) that the

archbishop was so far the absolute owner of the property—such was his dominion over it—that it is subject to the payment of even his general indebtedness, and passed by the deed of assignment to the assignee; that there was no trust of which the civil courts can take cognizance or assume control, or which can stand in the way of the ordinary course of administration of the assignment.

Except as to the claim of John G. Hendricks for improvements put upon the cathedral property, (which will be considered in another connection), the central and controlling question in the case is whether the church property, including all the property above mentioned, is liable for the debts of the archbishop, contracted as above, and passed to the assignee by the deed of assignment, and is now held by him to be applied to the extinguishment of the indebtedness proved before him. There are in all over two hundred pieces of church property in the diocese described in the petition of the assignee, but it was agreed by counsel upon the trial that fourteen different churches, institutions and properties, selected by them as representing the various questions of law and fact in the case, may be considered as representing all the property involved in the controversy.

The case is one of unusual magnitude and interest, as well in the questions as in the amount involved. It has received that consideration at our hands which its importance seemed to demand. We desire to acknowledge our obligation to the eminent counsel whose great learning, tireless research, and strong presentation of the case in all its varied aspects and complications, have so greatly assisted us in its consideration.

3. It will facilitate the consideration and disposition of this question to keep in mind a few fundamental facts and propositions which assume prominence at the threshold of the investigation. The archbishop, in his official capacity, has made no assignment. The diocese of Cincinnati has not gone into insolvency, nor have any of the churches or other institutions involved in this controversy. We are not dealing with church debts, nor with the assets of the church. John B. Purcell, the individual, made an assignment in insolvency of all his indi-

vidual property to an assignee to be by the latter applied to the payment of his individual debts. No property held by him in trust for others could, or was intended to, pass by deed of assignment. 1 Perry on Trusts, sections 334, 335, 336. This word "trust" is here employed in its legal sense, and is not intended to comprehend mere confidential relations or duties of which the civil courts may not take cognizance or assume control. All property subject, at law or in equity, to the payment of John B. Purcell's debts, whether held nominally in trust or not, passed by the assignment to the plaintiff below. No higher or better right or title to any of this property passed to the assignee than the assignor held. His creditors acquired no new rights or remedies in or against it by force of the assignment. The assignee simply represents them and their rights, which he has undertaken to enforce by the plain processes appointed by statute. They do not, in any sense, stand to the assigned property in the relation of purchasers. The beneficiaries of the property which the assignee is now seeking to subject to the payment of the assignor's debts, are free to assert against the latter every right and claim which, before the assignment, they could have asserted against the assignor. *Morgan v. Kinney*, 38 Ohio St. 610; Burrill on Assignments, § 391.

The questions before us are very similar to those which would have arisen if John B. Purcell, claiming to be in possession of this property, had brought suit to quiet his alleged title against those who now assert the trust, or as if, claiming to be the unqualified owner in fee-simple, had brought his actions against them to recover possession of the several properties held by them. The practical and substantial subject of the present inquiry is, have these supposed beneficiaries an interest in this property which they can assert as superior to the right of John B. Purcell or his creditors to subject it to the payment of his debts? Another important consideration which should be kept in view, is that none of the defendants are asking to have any trust performed or executed. They are simply standing upon the defensive—asking that the properties which they respectively speak for and represent, be left free from assault;

---

Mannix, Assignee v. Purcell *et al.*

---

asking that the relations which have obtained between them and their archbishop concerning these properties since they were first respectively possessed and used by them, be permitted to continue uninterrupted and unaffected. Instead of asking that the execution of the trusts be decreed, they simply pray that their destruction may be averted. They are content that the legal title to this property should remain where, by all the canons of their church, it has for so many years been reposed; but they ask that the uses to which, during all these years, it has been devoted, be not abused, perverted nor destroyed.

4. The parties have gone back fifteen centuries into the laws and canons of the church for proof of the nature of the tenure by which the archbishop held the legal title to ecclesiastical property. And the proof is overwhelming that he was not invested with an absolute title to it as his own. It is practically conceded that he held it in trust; but the parties are very far from a concurrence of views concerning the terms of the trust. The right to go to the rules and canons of the Catholic Church for the purpose of establishing, defining and limiting the trust is denied. That parol evidence may be resorted to to engraft a trust upon a title held by deed absolute upon its face, is a question which in this state has passed beyond the range of serious discussion; though the proof in such cases should be clear, strong and convincing. *Matthews v. Leaman*, 24 Ohio St. 615; *Broadrup v. Woodman*, 27 Ohio St. 559. The contention is that to resort to the law of the church as proof upon which to qualify the absolute terms of the grant, is to permit the law of the church to supersede or dominate the civil law; and much sensitiveness is shown by eminent counsel upon this subject. There is here no ground for alarm. It is no innovation upon the law of evidence, in determining questions like the one at bar, to call, in aid of the civil tribunal, upon the law of the particular church involved for the purpose of determining the title to church property. It surely is not unreasonable in a case like the present, to hold one of the great prelates of the Church of Rome to the terms upon which, by the very law to which he has vowed his fealty, he



has consented to accept the legal title to property which is appointed to the uses of the church to whose service he has with most solemn unction dedicated his life. It is but a form of establishing, by convenient and very convincing proof, what entered into the contemplation of the parties to the grant at the time the title vested. It has been held that where a religious body becomes divided, and the right to the property is in conflict, the civil courts will consider and determine which of the divisions submits to the church, local and general. This division is entitled to the property. In determining which of the divisions has maintained the correct doctrine, the findings of the supreme ecclesiastical tribunal of the denomination in question is binding upon the civil courts. *McGinnis v. Watson*, 41 Pa. St. 9; *Ramsey's Appeal*, 88 Pa. St. 60; *First Pres. Society v. Langley, Trustee*, 25 Ohio St. 128; *Ferraria v. Vasconcellos*, 31 Ill. 25; 3 Am. & Eng. Ency. of Law, 235. So where a bequest is made for a church, to take effect whenever a congregation should be formed, the proper ecclesiastical authorities are the judges of the formation of such congregation. *Fidelity Ins. Co.'s Appeal*, 99 Pa. St. 443. If by the laws of a Masonic lodge the Master, or of an Odd Fellows' lodge, the Noble Grand, was to be the repository of the legal title to all real property of the lodge, to be held in trust for its uses, would there be anything startling in the proposal to prove the law of the lodge in a controversy between the latter and its chief officer, involving the title to such property? Yet in such case it could as well be contended that the courts were permitting the law of Freemasonry or Odd Fellowship to supersede the law of the state, as it can now be asserted that we are enforcing the canons and decrees of Rome. It is no more than establishing, by a form of proof which the courts have held to be competent, the terms upon which, by the convention of the parties, the title to church property was granted and accepted.

5. It is to be observed, however, that the court below was not limited to such evidence in determining whether any and what trust was raised upon the title which the archbishop held. Formal written declarations of trust, sworn pleadings in other

---

Mannix, Assignee v. Purcell *et al.*

---

cases, and other written concessions of the archbishop made before any controversies like the present arose, were before the court to aid in the determination of this question. It is true that from time to time during the archbishop's service he exercised acts of apparent private ownership over property held for ecclesiastical uses. He sold property, received the proceeds, re-invested it in other property for church uses, executed mortgages upon property purchased, and received mortgages upon property sold. But so far as appears in the case, all this was done with the free acquiescence of the respective congregations and others interested in the property affected. There was evidence tending to show that the archbishop and his vicar-general represented to depositors that the entire church property was bound for re-payment of deposits as well as payment of interest. Counsel maintain that these representations charged such property with a liability to answer to such creditors. The court below very properly omitted to make a finding upon this evidence. The fact, if so found, would have been immaterial. The law will not permit a trustee thus to talk away the trust estate. The infirmity of the argument lies in its assumption of the very proposition in controversy. If the archbishop's control over church property was such that he could encumber it by his mere declarations, it was liable for his debts. He could not estop the *cestuis qui trustent* by his words. The latter were found by the court below to have been continuously in possession of the property.

It also appears that the congregations, through representative members, have, without objection from the archbishop, bonded and mortgaged church property in large sums. But prior to the transactions which led to the assignment, no occasion is shown where any collision or difference has arisen between the archbishop and any of the beneficiaries of the church property respecting its management or control. It has been reserved for the case at bar to present for the first time in the administration of the archbishop, a condition of things which called upon the various beneficiaries to question his right or power, or that of his successor in title, the assignee, to

interrupt or interfere without their consent, with their enjoyment of the uses to which the property has heretofore been devoted. This question is now fairly presented; and the nature of the trust upon which it is conceded the assignor held the property, is, for the purpose of determining whether any and what control a court of chancery may assume or exercise over it, squarely presented for adjudication.

6. The contention of the creditors is that though the archbishop may not have held this property by an absolute, unqualified ownership, yet the vagueness of the alleged trust, the uncertainty and indefiniteness as to the *cestuis qui trustent*, together with the absence of all other persons capable of dealing with, acquiring, or incumbering the legal title to this property, necessarily left the holder of the legal title supreme in his power of disposition and control.

Let us once assume that John B. Purcell was a trustee of this property, and a solution of the question at bar is relieved of much of the difficulty which would otherwise involve it.

Wherever there is a trustee there is necessarily a subject of the trust—the estate; an object of the trust—the use, and a *cestui qui trust*—the beneficiary of the trust. A trust is where property is conferred upon and accepted by one person on the terms of holding, using or disposing of it for the benefit of another. Wherever such a trust is shown, it is cognizable by a court of equity. The law knows no trust which simply binds the conscience. An alleged trust which is cognizable only in the court of morals or the forum of conscience, is no trust at all; it is an absurdity. The law does not acknowledge a trust over the exercise of which it will not, through its tribunals, assume control, to avert its destruction, perversion or abuse. *Morice v. Bishop of Durham*, 9 Ves. 400. It is true that in some cases alleged trusts may, as they do, fail by reason of some hard rule of evidence which prevents their proof; but let them once be established, and the power of a court of equity to control their exercise is almost universally conceded.

This was among the earliest subjects of chancery jurisdiction. While it was for a time supposed that the statute of

---

Mannix, Assignee v. Purcell et al.

---

uses—43 Eliz.—was the origin of this jurisdiction, it is now conceded that it ante-dated that statute, and is now freely exercised in states which do not regard that statute as in force within their jurisdiction. *Urmy v. Wooden et.al.*, 1 Ohio St. 160.

7. Indefiniteness in the number and identity of the alleged *cestuis qui trustent* is urged as conclusive against the assumption that this property is held upon any trust of which the courts will take cognizance.

The cathedral and other church buildings have been, since their completion, actually and openly possessed and used by their respective priests and congregations; the schools by their pupils and teachers; the orphan asylum by the sisters of charity in charge and about four hundred orphans; and the grave yards, (except the part devoted by the court below to the payment of debts,) by those in charge who have daily devoted them to the burial of the dead. It is true that none of these have been incorporated or otherwise organized under any law of the state. Indeed, their immediate management and control have been in such hands as to illustrate that very principle or element of indefiniteness which has, for many centuries, been one of the controlling characteristics of a trust for charitable and pious uses. It is said that vagueness is, in some respects, essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins. *Fontain v. Ravenel*, 17 How. 384; *Saltonstall v. Sanders*, 11 Allen, 456; *Russell v. Allen*, 107 U. S. 163; 3 Am. & Eng. Ency. of Law, 127; 2 Perry on Trusts, sec. 687. The individual recipients of the charity are constantly changing. For illustration, take the case of a congregation of one of the churches in question. It may be that among those who comprise it there is not one member who worshipped there ten years ago. Yet it is in legal contemplation the same congregation. It is the congregation for whose uses, as a place of religious worship, the church has been from the first devoted. Its name and the location of its place of worship render its identification easy.

8. Is it such an entity as that it may constitute a beneficiary to support a trust for a charitable use? If these congregations and other beneficiaries are sufficiently tangible and substantial to have a standing in court, the question ought, it would seem, to be resolved in their favor. This seems to us a fair test of the question. Are they in court? They are represented each by prominent members who answered below for themselves and the other members; the orphan asylum by prominent contributors to its establishment and support, with whom were associated several members of the catholic sisterhood in charge; the schools are similarly represented, and the cemeteries by the St. Joseph's Cemetery Association, incorporated since the assignment, to which the legal title has been conveyed by John B. Purcell, or whatever interest then remained in him. It is a well recognized practice for certain persons, belonging to a voluntary, unincorporated society, and having a common interest, to sue in behalf of themselves and others having a like interest, as part of the same society, for purposes common to all and beneficial to all. In *Beatty v. Kurtz*, 2 Peters, 566, several members of an unincorporated Lutheran congregation, having no trustees capable of holding the legal title to church property, were permitted to appear in court in behalf of themselves and others having like interests, for the purpose of preserving a trust in a lot set apart upon a town plat, "for the Lutheran Church," upon which they had established a place of burial and erected a school house, but the legal title to which was still in the heirs of the original proprietor. See also, *Phila. Bap. Ass'n v. Smith*, 3 Peters, 500; *African M. E. Church v. Conover*, 27 N. J. Eq. 159; *Hullman v. Boncamp*, 5 Ohio St. 242; 6 Ohio, 298; 7 Ohio, 218. It does not follow, however, that, in the light of the facts established in the court below, it would not have protected the uses for which the property was held, even if these beneficiaries had not been formally in court. But they are in court.

9. It is scarcely necessary to cite authority to show that the uses for which this property is held, are such as the courts will uphold. The education of the youth; the care, education and nurture of orphans; the religious instruction of the liv-

ing and the decent repose of the dead, are among the most prominent and common objects of charitable trusts. 2 Perry on Trusts, Secs. 669, 700, 701, 706; 3 Am. & Eng. Ency. of Law, 122; *Gerke v. Purcell*, 25 Ohio St. 229, (where some of the property now in controversy is declared to be held in trust); *McIntire v. City of Zanesville*, 17 Ohio St. 352; *Trustees v. Zanesville Canal Co.*, 9 Ohio, 287.

Surely this court ought not to be expected to declare that the trusts in the case at bar are too vague or indefinite to be recognized by it after its decision in the two cases last cited. It there upheld and enforced a charitable bequest to an unincorporated association "for the use and support of a poor school which they are to establish for the use of the poor children of the town of Zanesville;" the donee afterwards becoming incorporated. Compared with such a use, the objects of the trusts in the case at bar are simple and definite.

Lane J., in the case last cited, says concerning the extent of chancery jurisdiction over charities: "One of the earliest elements of every social community, upon its lawgivers, at the dawn of its civilization, is adequate protection to its property and institutions which subserve public uses, or are devoted to its elevation, or consecrated to its religious culture and sepulchers;" etc.

In *Miller v. Teachout*, 24 Ohio St. 425, this court sustained a bequest to an executor "for the advancement and benefit of the Christian religion, to be applied in such manner as in his judgment will best promote the object named."

In *Urmy v. Wooden*, 1 Ohio St. 160, the court sustained a bequest to "the poor and needy, fatherless, etc., of Jefferson and Madison townships, of the county aforesaid, to such poor as are not able to support themselves, to be divided as my executors may deem proper without any partiality." In *Sowers v. Syrenius*, 39 Ohio St. 29, it sustained a testamentary disposition "for the preaching of the gospel of the blessed son of God, as taught by the people now known as the Disciples of Christ, the preaching to be well and faithfully done in Loraine county in Birmingham, and at Berlin in Erie county, Ohio."

In *Williams v. First Pres. Society of Cincinnati*, 1 Ohio St. 478, the court held that a deed to certain persons as "trustees for the presbyterian congregation of Cincinnati, and their successors forever, for the use, benefit and behoof of the congregation forever," there being then but one such congregation, is not void for uncertainty as to the beneficiaries of the trust, although they were not then incorporated. This bears with much weight upon the questions at bar. In none of these cases could the beneficiaries assert any special pecuniary interest in the trust estate, but the uses upon which the legal title was conferred were recognized and enforced.

10. Much of the complication and difficulty in which the discussion of the present case has involved it, arises from an attempt to solve it by the tests which are usually applied to cases of alleged resulting trusts, and from a failure to mark the distinction between active trusts, where the nature of the trust is such as to render it necessary, for the purposes of the trust, that the legal title should remain in the trustee (who cannot be compelled to convey), and a passive trust, where the *cestui qui trust* has the right to be put in actual possession of the property, or the right to call upon the trustee to convey the legal estate, as the former may direct. Bispham's Eq., sec. 50.

The distinction between resulting trusts and trusts for charitable or pious uses is almost as clear and as broad as that between legal and equitable estates. The foundation of a resulting trust is the payment, or the securing to be paid, by the *cestui qui trust*, out of his own means, the consideration of the conveyance, or some part thereof, at its completion. *McGovern v. Knox*, 21 Ohio St. 552. A resulting trust is to be performed or executed by the trustee by transferring the title to the *cestui qui trust* at his request. *Millard v. Hathaway*, 27 Cal. 119; 1 Perry on Trusts, sec. 165a.

No one seriously claims that the donors of the various charities now in question—those whose donations and contributions so largely comprise the funds to which they owe their existence—have a definable, pecuniary interest in, or claim upon, them which is enforceable in any court. Indeed, no such claim is made in their behalf. Nor is any personal or pecun-

iary interest asserted by or on behalf of those to whose uses they are being devoted. Their interest in them is limited to the enjoyment of these uses. As already observed, they are not seeking nor asking the enforcement or execution of any trusts in their behalf. The trusts which attach to these various properties have been and are still being performed and executed. Each day that public religious worship is held by, or the sacraments of the church administered to, members of the congregations of any of these churches therein; each day that pupils are instructed in the schools; that the orphans are sheltered and cared for in the asylum; that the cemeteries are opened to receive the dead, witnesses the performance of the trusts upon which they are held by the archbishop of the diocese. The prayer is identical with that of the bill in *Beatty v. Kurtz*, 2 Peters, 566, *supra*, that they be left undisturbed in the enjoyment of the uses to which the property actually possessed by them has been so long devoted. In this view, the assumed difficulty or impracticability of enforcing these trusts disappears entirely as an element in the case.

Upon this feature of the case the eminent counsel for the assignee, among other things says:

“Can the beneficiaries be the individuals who attend the church, or who constitute the so-called congregations? Certainly not; as no private advantage can be claimed for them, nothing can pass to them, nor can they, as individuals, act in any capacity in relation to the property. They are not only not an incorporated body or association, but they never can be incorporated as a body and continue to be part of the Roman Catholic Church. Take away the bishop, and there can be no priest to manage the affairs of the Church, and there can be no Catholic Church without a priest. Take away the bishop and the Church is gone forever. The congregation no longer has an existence, and the property must descend to the heirs of the grantee in the deed, unless it is disposed of by the deed of the grantee himself.”

It is sufficient answer to this to say that it will be time to deal with such an aspect of the case when such a calamity overtakes the Church as the one suggested by counsel.



We are not called upon to prophesy what this court would or ought to do with this property when, if ever, bishop, priests, churches and congregations are "gone forever." We are dealing with a present, acting bishop (the successor of Archbishop Purcell, deceased), with officiating priests, with living churches and with worshiping congregations. It is against a disaster quite as fatal as that supposed by counsel that the court is asked to interpose its restraint.

Instead of asking that the head of the Church of the diocese convey, or be divested of, the legal title, the beneficiaries ask that it remain in him upon the same trusts and for the same uses to which, from the first, it has been devoted. Indeed, it is quite indispensable to the existence of the trust that the legal title be held by some one other than the *cestuis qui trust-ent*, who are incapable, by reason of the indefiniteness which characterizes their personality, of holding it.

11. Was the dominion of the archbishop over this property such as to render it subject, at law or in equity, to the payment of his debts? The debts are, almost, if not quite, exclusively, such as were contracted in the business of receiving money on deposit upon the terms of paying interest upon it while on deposit, and finally restoring the principal. It surely cannot be seriously claimed that this important branch of the banking business was within the terms or powers of the trust upon which the property was held. It originated with, and was prosecuted exclusively by, the vicar-general, Edward Purcell. The archbishop stated, among other things upon this subject, that this business had its origin in the failure of the banks, and the desire of the depositors that Father Edward should take their money and keep it for them, they refusing any security, but trusting to his integrity and good faith; and that he labored for them without compensation, to earn for them interest on their money. While the findings of the court below do not in form embrace one upon this subject, they are entirely inconsistent with any such power, as are also the conclusions of law. The member of the court below who prepared the opinion of the court (Smith, J.), in a very able

and exhaustive presentation of the reasons which prompted the judgment, says that "most of the present indebtedness grew out of his brother's banking business; receiving money on deposit, paying interest and lending it out on interest. The canon law strictly forbade this to be done by ecclesiastics. All the canonists concur in this testimony. It could hardly be a debt of the trust when the authority creating and regulating the trust strictly forbade it."

There is no serious attempt by any creditor to trace moneys deposited by him into any specified property. There was but one fund. The book-keeping was crude and primitive. While some money deposited must have gone into church property, donations must have gone to pay interest upon, and re-pay the principal of, deposits; but the controversy is chiefly between depositors who expected interest and finally their principal, and those who gave without hope of either interest or principal, except as it came in the enjoyment of the uses to which the property was devoted.

12. The theory that these are diocesan debts to be satisfied out of diocesan or general church property, is untenable. It is not made to appear in this case that a diocese is a body or an organization capable of owning property or of contracting debts. A diocese is the circuit or extent of a bishop's jurisdiction; the district in which a bishop exercises his ecclesiastical authority, but it has not been made to appear that it is constituted to hold either the legal or equitable estate in any property which is devoted to church purposes. Certainly no such party was summoned nor made its appearance in this cause, and we have not heard of any complaint of a defect of parties in the courts below. The legal title to all this property is in the bishop; while the equitable or beneficial interest is in the several congregations and others for whose several uses they are respectively held. There seems to be no room for another owner. There is no such triangular title as this theory assumes.

Each of these congregations and other beneficiaries is here defending for itself and in its own rights. Each piece of property is held upon a separate trust, and for a distinct use. No

warrant is shown for charging upon one the expense incurred on account of another.

In the case of *Tuigg, Trustee v. Tracy*, 104 Penn. St. 493, the right to charge upon one congregation of a Catholic church expenses incurred for the benefit of another, was under consideration in the light of the rules of the church. They were under the same general canonical laws which prevailed in the diocese of Cincinnati. The court say: "Whether or not, therefore, Father Tracy, (who was pastor of St. Bridget's congregation), paid and expended the money of St. Bridget's as his own, in the St. Joseph's Mission, at the instance and request of the bishop, is not important, as the bishop had no more right to pledge the credit of the congregation in an enterprise it had not undertaken or assumed, and in which it had no particular concern, or to divert the funds of the congregation from their use, than the pastor himself, and neither, it would seem, had any power."

While this is not an adjudication of the power of the archbishop which controls us in the case at bar, it affords strong support to the finding of the court below, especially as the sources of information were practically the same in both cases.

Our conclusion is that the property sought to be subjected to the payment of the individual debts of John B. Purcell (except so much of the cemeteries as was devoted to such purposes), was "held in trust for others," and did not pass to the assignee by the deed of assignment.

13. Some of the defendants and cross-petitioners acquired judgments upon their claims against John B. Purcell after the assignment, but we are not able to discover how their situations are improved by that fact.

14. The claim of John G. Hendricks, another cross-petitioner below and cross-petitioner in error in this court, stands upon ground distinct from all others. He obtained a judgment against John B. Purcell, also after the assignment, upon a claim composed in part of an indebtedness for money deposited to bear interest, and in part for improvements and repairs placed upon the Cathedral, and for its preservation, at the request of the archbishop. We are all in accord upon the

proposition that the latter claim possesses peculiar merit, upon the principle that the trust property should answer for the reasonable expense incurred in its preservation and necessary repair and improvement. We are not in accord, however, as to the means of effectuating this right. A majority of the court is of opinion that the remedy may be granted in this case, and for this purpose the judgment as to this claim is reversed and the cause remanded for further proceedings upon this branch of the controversy. The eminent counsel who represents Hendricks, predicates his claim to be re-imbursed out of the general church property chiefly (to the extent of his entire claim) upon the authority which he maintains is conferred upon the archbishop by an act of the general assembly passed January 3, 1825, which it is claimed was in force at the time of the assignment (2 Chase's Stat. 1460).

It is entitled: "An act securing to religious societies a perpetuity of title to lands and tenements conveyed in trust for meeting-houses, burying-grounds, or residence for preachers."

It is as follows:

SEC. 1. *Be it enacted, etc.,* that all lands and tenements, not exceeding twenty acres, that have been or hereafter may be conveyed by devise, purchase, or otherwise, to any person or persons as trustee, trustees, in trust for the use of any religious society within this state, either for a meeting-house, burying-ground, or residence of their preacher, shall descend with the improvements and appurtenances in perpetual succession in trust to such trustee or trustees as shall from time to time be elected or appointed by any such religious society, according to the rules and regulations of such society respectively.

SEC. 2. That the trustee or trustees, for the time being, of any religious society aforesaid, shall have the same power to defend and prosecute suits at law or in equity, and do all other acts for the protection, improvement and preservation of said property, as individuals may do in relation to their individual property.

Upon this proposition the counsel stands alone, and his contention has provoked a vigorous cross-fire from his co-defendants and the assignee. It is by them contended that the act,

if in force, does not and never was intended to apply to the Catholic Church and its bishops. We have not found it necessary to attempt a solution of this controversy. Conceding, for the purposes of the discussion, that it is broad enough to comprehend Catholic bishops and church property, it still falls far short of supporting the claim of Hendricks, that his claim for money deposited is a charge upon church property. It is maintained that the effect of this statute is to give to the official holding the trust property, power to sue and be sued in his own name—to defend and to prosecute suits at law or in equity—and to do all other acts, such as to make contracts, which individuals may do in relation to their individual property, for its protection, improvement and preservation. It is maintained that this act invested the archbishop with all the characteristics of a corporation sole, though it is said that this position is not essential to the argument.

The antecedent of “said property” in the second section of the act, is “all lands not exceeding twenty acres conveyed, etc., to any person as trustee, either for a meeting-house, burying-ground, or residence of their preacher.” The power given is to do acts “for the protection, improvement and preservation of said property.”

As we have indicated, it required no legislation to authorize a charge upon this property for money expended “for its protection, improvement and preservation.” The act in question contemplates the protection, etc., of specific property—“a meeting house, burying ground, or residence for the preacher.” There is no pretense that the money deposited by Hendricks was applied to the improvement, etc., of any particular church property. There is evidence that some of it was expended in the education of some young men for the priesthood. But the claim is supported upon the theory that the debt is diocesan, and that diocesan (meaning general church) property should satisfy it. This view of the case has already been sufficiently considered, and an adverse conclusion reached.

15. No cross-petitions in error are filed by the various congregations, etc., to the order of the court below, for an account of the assets of John B. Purcell, in the form of claims

for money advanced by him, for the construction of various churches, etc., nor is the claim made that such order is not a final one. We are all impressed with the general equity and fairness of this feature of the judgment below, and it is, for the reasons stated, left undisturbed.

16. Louis Nardini, trustee for Benedetto Gatto, one of the defendants below, filed his cross-petition setting up a mortgage upon the orphan asylum, executed by John B. Purcell, with which issue was joined, trial had, and judgment rendered against him, to which he excepted. He filed his separate motion for a new trial, which was overruled; he excepted and took his separate bill of exceptions. His claim was adverse to all the other parties in the case. He failed to file a cross-petition in error in this court within two years after the judgment against him. Has he a standing in this court? A cross-petition in error is not expressly authorized by our code. It was claimed in *Seitz v. Railway Co.*, 16 Kan. 131, that the proceeding was unauthorized, and the court so held, and that a separate proceeding in error was necessary. The same question was first presented in this court in *Shinkle v. The Bank*, 22 Ohio St. 516. It was contended that such a pleading was unauthorized. The court, by Welch J., said: "There is no good reason why cross-petitions in error should not be allowed equally as in original actions. They were allowed at common law, and there is nothing in the code which forbids their use. On the contrary, they are calculated to subserve a leading object of the code, namely, to avoid multiplicity of suits, and to render litigation simple, cheap and speedy. \* \* \* To summon the opposite party, who is already in court, and to bring in a copy of the record, a copy of which is already in court, would be a useless labor, and involve an unnecessary expense and delay, etc." The Supreme Court of Kansas was again called upon to consider this question in *Stettauer v. Carney*, 20 Kan. 496, when it overruled its former decision upon the authority of *Shinkle v. The Bank*, *supra*, saying: "We are constrained to believe that in this respect the decisions of the Supreme Court of Ohio are the better exposition of the law."

Again in *Bundy v. Iron Co.*, 35 Ohio St. 80, a motion was made in this court for leave to file a cross-petition in error. At the time no leave was required to file petitions in error. It was said, by the court: "As held in *Shinkle v. First Nat. Bank*, 22 Ohio St. 516, it is competent for a defendant in error to file a cross-petition asking the reversal of the judgment for errors prejudicial to him, and not assigned in the plaintiff's petition. And as a petition in error may, under the present legislation, be filed without leave of court, the same rule will be applied to the cross-petition."

The just inference is that if the law *had* required leave to file a petition in error, the same rule would necessarily have applied to a cross-petition in error. In the case before us the errors which Nardini relied upon were not assigned by the plaintiff in error; he stood upon his own right. The judgment against him stood unchallenged upon the record. There can be little doubt that if the proceeding in error by the plaintiff had been dismissed at any time before Nardini's cross-petition in error was filed, his branch of the case would also have gone out of court. The logic of the foregoing cases and considerations is that such a proceeding is *the prosecution of a proceeding in error*; but to avoid a multiplicity of suits, he may in the same case and upon the same record predicate that prosecution. If a law requiring leave to file a petition in error would apply as well to a cross-petition in error, they are so far upon the same footing as that if the two years' limitation applies to one, it applies with the same force to the other. All parties in whose favor the judgment of which he complains was rendered (and it was in favor of all but himself), had a right to suppose, after the expiration of two years from its rendition, that it stood unquestioned, and was forever at rest. The cross-petition in error was filed too late. This conclusion relieves us of a further consideration of the question arising upon this mortgage, and the judgment thereon is affirmed.

17. The writer of this opinion does not concur in so much of the judgment as remands the case to the court below for further proceedings upon the claim of Hendricks; nor does he concur in the affirmance of so much of the judgment below as

---

Mannix, Assignee v. Purcell *et al.*

---

devotes a part of the St. Joseph's Cemeteries to the payment of creditors, believing that these are quite clearly shown to be trust property, and that they did not pass to the assignee by the assignment.

With the modification above indicated of the judgment against Hendricks,

*The judgment below is affirmed.*



# CASES

## ARGUED AND DETERMINED

### IN THE

# SUPREME COURT OF OHIO.

JANUARY TERM, 1889.

---

<p>HON. SELWYN N. OWEN, CHIEF JUSTICE.</p> <p>HON. FRANKLIN J. DICKMAN,</p> <p>HON. THAD. A. MINSHALL,</p> <p>HON. MARSHALL J. WILLIAMS,</p> <p>HON. WILLIAM T. SPEAR.</p>	}	<i>Judges.</i>
--	---	----------------

---

46	153
48	107
48	481
46	153
49	533
<hr style="border: none; border-top: 1px solid black; height: 1px;"/>	
46	153
61	262
<hr style="border: none; border-top: 1px solid black; height: 1px;"/>	
48	153
65	541
65	542
<hr style="border: none; border-top: 1px solid black; height: 1px;"/>	
46	153
70	87

LEE, TREAS. v. STURGES.

ERROR to the Court of Common Pleas of Richland County.  
Reserved in the District Court.

INSURANCE CO. v. RATTERMAN, TREAS.

ERROR to the Superior Court of Cincinnati.

*Taxation—When shares of stock in foreign corporations, held by residents of Ohio, liable to—Section 3 of the act of April 5, 1859, (S. & C. 1438), construed—Effect of construction, of the tax Laws of Ohio, by officers having the enforcement of the same.*

1. The provision of section 3 of the act of April 5, 1859, (S. & C. 1438), that "no person shall be required to include in his statement as a part of the personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, which he is required to list, any share or portion of the capital or property of any company or corporation, which is required to list or return its capital and property for taxation in this state," does not apply to shares of a foreign corporation, although the capital of the corporation is taxed in the state where located, and although the corporation has substantial property in Ohio on which it pays taxes here; nor does it apply to shares of a railroad company

(153)

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas.

---

which is formed by the consolidation of an Ohio company with companies of other states, notwithstanding such company pays taxes in Ohio on the portion of its property which is situated here.

2. A construction, by officers having the enforcement of the tax laws of Ohio, since the enactment thereof, to the effect that, under such laws, shares held by residents of Ohio of stock of foreign railroad corporations having property in this state on which they pay taxes, and of consolidated railroad companies, are not taxable in Ohio, does not bind the successors of such officers, nor the state, in the proper assessment and collection of taxes upon such shares.

(Decided January 8, 1889.)

The plaintiff in error, Lee, was, at the commencement of the action, treasurer of Richland county. By his petition, filed August 16, 1878, he sought to recover, as taxes for the year 1876, upon shares of stock owned by defendant, of The Western Union Telegraph Company and The Lake Shore & Michigan Southern Railway Company, the sum of \$1,024.34, and as taxes for the year 1877, upon stock of the same railway company, \$591.73, together with ten per cent. penalty, in all \$1,777.67, and interest. The taxes were placed upon the duplicate by the auditor after the semi-annual settlement with the treasurer, and penalty added, and the penalty so added and demanded is that provided for by section 2855 of the Revised Statutes.

The facts, as found by the district court, show that The Western Union Telegraph Company is a corporation organized under the laws of the state of New York, and carries on the business of transmitting telegraphic dispatches through the state of Ohio and other states. It owns real estate, not in Ohio, exclusive of its line, of the value of \$2,635,556.86. Its entire line is 78,955 miles; in Ohio it is 4,950 miles. Its property in this state consists of its line, telegraph apparatus, chemicals and office furniture. The property has been returned, and the company has paid taxes on it since 1872, from \$10,000 to \$15,000 each year.

The Lake Shore & Michigan Southern Railway Company is the result of a consolidation of a number of corporations of the states of Michigan, Illinois, Indiana, Ohio, Pennsylvania and New York, the Ohio corporation being called the Lake

Shore Railway Company. It owns a railroad from Buffalo, New York, to Chicago, Illinois, extending through Ohio and into each of the other states named; also feeders and branch lines. Its capital stock is \$50,000,000, made up from the aggregate capital stock of the several corporations which were consolidated to create it. Of its track, 377 miles are in Ohio. The stock of the Lake Shore Company amounted to \$15,000,000, and by the terms of the consolidation agreement, the owners of the stock of that corporation surrendered their stock and received a like amount of the stock of the consolidated company. Since 1870, the consolidated company has returned for taxation, and paid taxes on, its property in this state, consisting of its lines of railroad, road-beds, depots, station-houses and the necessary real estate for the same, rolling stock, and other property, of the value of \$13,000,000, paying in the year 1877, the sum of \$286,817.38, on a valuation of a little over one-fourth its capital stock.

Upon the facts so found, the district court ordered reserved to this court, as question of law, "whether or not shares of the capital stock of the said The Western Union Telegraph Company, and The Lake Shore & Michigan Southern Railway Company are taxable in the hands of individual owners of the same, who are residents of the state of Ohio?" which is the only question in this case.

The plaintiff in error, The Western Insurance Company of Cincinnati, seeks to enjoin the treasurer of Hamilton county, Ratterman, from collecting taxes assessed against the company for the year 1886, to the amount of \$681.80, upon shares of stock owned by the company of The Cincinnati, Indianapolis, St. Louis & Chicago Railway Company, and of the stock of The Pittsburgh, Ft. Wayne & Chicago Railway Company. The taxes were entered upon the tax duplicate by the auditor by way of correction of the return made by the company. In the superior court a motion to strike from the petition, as irrelevant and as surplusage, the following paragraph, was sustained, viz.:

"Since the year 1852, the statutes of Ohio relating to the taxation of investments in stocks of corporations have been

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas.

---

substantially the same as those in force on the day following the second Monday of April, 1886, and in all this period said statutes have been construed, not only by the people of the state of Ohio generally, but by the officers charged with the execution thereof, as not requiring the owners of shares of stock in railway corporations, the capital of which is divided into shares which are transferable by each owner without the consent of the other stockholders, and part of the line of the railway of which lies within the state of Ohio, to list the same for taxation, or authorizing the officers of said state to tax the same against the owner thereof, and that, at the time the property was required to be listed for taxation in 1886, there was no law of Ohio, as plaintiff believes and charges, which subjected such shares of stock to taxation in the hands of the owners thereof."

The sustaining of this motion is one of the grounds of error. Defendant filed a cross-petition, asking to recover \$681.80, taxes, and fifteen per centum penalty.

The Cincinnati, Indianapolis, St. Louis & Chicago Railway Company is an Indiana corporation. Of a total of 177.47 miles of road, 20.64 miles are in Ohio, the remainder in Indiana. Of a capital stock of \$7,000,000, the property on which the corporation pays taxes in Ohio is \$477,609. The value of the capital stock at the time of this assessment was \$4,655,000, or \$66.50 on each \$100.00 of stock, the taxes paid being on a valuation of a little over one-tenth the value of its capital stock.

The Pittsburgh, Fort Wayne & Chicago Railway Company is a corporation organized under the laws of Pennsylvania, Indiana and Illinois, owning a line of railway from Pittsburgh, Penna., across Ohio and Indiana to Chicago, Illinois. Its entire line is 468.32 miles, of which, 251.65 are in Ohio. Its capital stock was valued in April, 1886, at \$40,553,143.99, and it paid taxes on property in Ohio valued at \$8,749,197, being something over one-fifth the value of its stock.

The insurance company included these stocks in its return to the auditor, placing them under the head of securities not subject to taxation.

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas.

---

In the superior court judgment was rendered in favor of the defendant for the amount of taxes and penalty claimed in his cross-petition, which judgment was affirmed at general term, and it is to reverse that judgment that this proceeding in error is brought.

*Jenner & Tracy*, for Lee, Treasurer.

*C. H. Scribner, Dirlam & Leyman, J. M. Jones, Estep, Dickey & Squire*, and *O. G. Getzendanner*, for Sturges.

*Paxton & Warrington, Follett, Hyman & Kelley, Lincoln, Stephens & Lincoln, Harmon, Colston, Goldsmith & Hoadly, Wm. Worthington, George Hoadly, Thomas McDougall, Joshua H. Bates, Kramer & Kramer, Nash & Lentz*, for Western Insurance Company.

*Rufus B. Smith, W. A. Davidson, Wm. L. Avery*, and *Goss & Cohen*, for Ratterman, Treasurer.

SPEAR, J. The questions arising upon the record are: (1.) Whether shares of stock held by citizens of Ohio in a foreign corporation, which has in this state substantial property upon which it pays taxes, are taxable here; and, (2.) whether shares so held of stock of a consolidated railroad company are taxable here, where the company is formed by consolidation of an Ohio company with companies of other states, and has substantial property in the state on which it pays taxes, the larger portion of its property being without the state.

The claim against their taxability is substantially that (1) the legislature has not authorized such a tax—or, in other words, there is no law for it; (2) it has authorized holders of such shares to omit them from their tax returns; (3) the tax laws have been thus construed from their inception by the taxing officers and tax-payers; and (4) the levying of taxes upon such shares would impose unequal burdens, and would result in double taxation.

It is believed that as to the telegraph stock at least, previous decisions of this court have practically determined the controversy, if indeed, they have not disposed of all the questions in the cases. We will now refer to those decisions in con-

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas.

---

nection with the constitutional and statutory provisions which affect the questions.

Section 2 of article 12 of the constitution provides that "laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money," and that "personal property, to an amount not exceeding in value \$200, for each individual, may, by general laws, be exempted from taxation."

Section one of the act of April 5, 1859, (S. & C. 1438,) entitled "an act for the assessment and taxation of all property in this state, and for levying taxes thereon according to its true value in money," (which act is now codified in Revised Statutes, as section 2730, and following,) is as follows: "That all property, whether real or personal, in this state, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, of persons residing therein; the property of corporations, now existing or hereafter created, and the property of all banks or banking companies, now existing or hereafter created, and of all bankers, except such as is hereinafter expressly exempted, shall be subject to taxation; and such property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, or the value thereof, shall be entered on the list of taxable property, for that purpose, in the manner prescribed by this act."

Section 2 defines the term "investments in stocks" in these words:

"The term 'investments in stocks,' wherever used in this act, shall be held to mean and include all moneys invested in the public stocks of this or any other state, or of the United States, or any association, corporation, joint stock company or otherwise, the stock or capital of which is or may be divided into shares, which are transferable by each owner, without the consent of the other partners or stockholders, for the taxation of which no special provision is made by this act, held by persons residing in this state, either for themselves, or as guardians, trustees or agents."

The 9th subdivision of section 3, provides that "no person shall be required to include in his statement as a part of the personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, which he is required to list, any share or portion of the capital or other property of any company or corporation which is required to list or return its capital and property for taxation in this state."

Section 59 of the act provides that "no person shall be required to list for taxation any certificate of the capital stock of any company the capital stock of which is taxed in the name of said company."

It is clear that the purpose of section one is to tax *all* investments in stocks held within the state. This we are bound to assume, for every presumption is in favor of that construction of the law which gives effect to the requirement of the section of the constitution referred to, and we are forced to the conclusion that the general assembly, in enacting this law, intended, so far as the complex nature of human business affairs should make it practicable, to include within the taxing provisions *all* property within the state, and not to exceed in its exemptions the limit prescribed, as to persons, of "personal property not exceeding in value two hundred dollars for each individual." And, further, that where an exception or exemption is claimed, the intention of the general assembly to except must be expressed in clear and unambiguous terms. "The exemption must be shown indubitably to exist. At the outset every presumption is against it. A well-founded doubt is fatal to the claim. It is only where the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported." *Railway Co. v. Supervisors*, 93 U. S. 595; *Tucker v. Ferguson*, 22 Wall. 527. Intent to confer immunity from taxation must be clear beyond a reasonable doubt, for, as in case of a claim of grant, nothing can be taken against the state by presumption or inference. *Delaware Railroad Tax*, 18 Wall. 206; *Kirtland v. Hotchkiss*, 42 Conn. 426; *Cincinnati College v. State*, 19 Ohio, 110; *Railroad v. Dennis*, 116 U. S. 665; *Farrington v. Tennessee*, 95 U. S. 679; *Railroad v. Guffey*, 120 U. S. 569; *Rail-*

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas.

---

road v. *City of Saco*, 60 Me. 196 ; *Lima v. Cemetery Association*, 42 Ohio St. 128. It seems equally clear that the legislative purpose was to tax all the property of corporations as well as all investments in stocks.

The stock in question comes within the description contained in sections one and two above quoted. It follows that, if this act be valid, the stocks sought to be taxed here are properly taxable unless it is made clearly to appear that they are, in whole or in part, within the spirit and letter of the exceptions. That the act is valid, and that stocks held here in foreign corporations may be taxed, was distinctly held in *Worthington v. Sebastian*, 25 Ohio St. 1, and in other cases.

It may be assumed that "capital stock" and "capital and property" mean practically the same thing. Primarily the "capital stock" is the money paid in by the stockholders in compliance with the terms of their subscriptions. It soon, however, takes the form of real estate, or personal property, or both, including machinery, buildings, credits, rights in action, etc. So that it may here be taken to mean personal property, and such real estate as may be necessary to the daily operations of the company, and its moneys and credits. The capital is thus represented by the property in which it has been invested.

The contention in support of exemption is, that in using the language "any company or corporation which is required to list or return its capital and property for taxation in this state," and the expression "any company, the capital stock of which is taxed in the name of the company," the general assembly had in mind such capital and property, and such only, as is, or might be, within the state, and not all the capital or property of the corporation. So that, though the corporation be a foreign one, if any of its property is within the state and listed here for taxation, that fact alone authorizes the owner of shares to omit them from his return. Hence, as this company lists that part of its property which is in Ohio, the condition of exemption is fully met, and the shares exempt; that to require the shares of stock to be listed by the stockholders would result in double taxation. The facts



show that about one-sixteenth of its line is in Ohio. A very small part is returned for taxation here, and taxes are paid upon that small portion. The great bulk is without the state and beyond its reach. It falls far short of meeting the letter and spirit of the words, "its capital and property." The language is not "to return its capital and property *within the state* for taxation," but is to "return its capital and property for taxation in this state." The "capital and property" is not a small part of it. We cannot say that so much of the valuation as has been assessed in Ohio in the name of the company may be deducted from the value of the shares, and the balance taxed. We must take the statute as we find it. We cannot interpolate words and make the clause read as though written "which is required to list or return a part of its capital and property," or the other read as though written "any portion of the capital stock of which is taxed in the name of the company." Had the general assembly intended this meaning, they would have used apt words to express it.

As to the matter of double taxation, we think the objection apparent rather than real. Whether shares of the stockholders, and the capital of the company, constitute the same, or different species of property, has been the subject of much discussion in a great number of cases. But the weight of authority we believe to be in favor of the proposition that shares of stock constitute property distinct from the capital or property of the company. This court, in cases elsewhere cited, has recognized such distinction. Our statute (Rev. Stats., § 3255), declares them to be personal property. The capital or property of the company may be largely real estate, while the shares are, in their nature, personalty. They can have no locality, and must, therefore, of necessity, follow the person of the owner, unless other provision is made by statute. The corporation is the legal owner of all the property of the company, real and personal, and within the powers conferred upon it by its charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. The interest of the shareholder entitles

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman. Treas.

---

him to participate in the net profits in proportion to the number of his shares; to have a voice in the selection of officers to manage the business of the company in like proportion, and, upon its dissolution, the right to his proportion of the property of the corporation that may remain after payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him; is under his sole control, so that he may sell or hypothecate it. He is entitled, from net earnings of the corporation, to dividends upon his stock, and the value of the stock depends largely upon its capacity for earning dividends. The shares of stock may be worth much more than the property of the corporation; that is, the franchise may be very valuable while the visible capital may be of but little value, and dividends may be greatly out of proportion to the tangible property, as frequently occurs in regard to street railroads, gas companies, electric light companies, etc. *Farrington v. Tennessee*, *supra*, 686, 687; *Watson v. Spratley*, 10 Exch. 236; *People v. Commissioners*, 4 Wall. 244; *Union Bank v. State*, 9 Yerger, 490; *Cook v. Burlington*, 59 Iowa, 251. It follows from this that, although the shareholder may be affected as regards the extent of his dividends by taxation of the property of the corporation, yet a tax on the shares is not a tax on the capital of the company, and *e converso*, a tax on the capital is not a tax on the shares held by the stockholders. Taxation of the capital and property of the corporation, though it be accepted by the state as an equivalent for, is not the same as, a tax on the shares.

We have many subjects of taxation which approach more nearly to double taxation than that of taxing capital stock and individual shares of stock in addition. Take the familiar instance of the taxation of mortgages. The owner of real estate, a farm for instance, mortgages it for money to invest in cattle to stock it. He pays taxes on the land without deduction, and on the live stock, and the lender of the money pays taxes on the mortgage. By reason of this latter fact the lender demands more interest, which the farmer pays. He thus pays taxes on his farm, on his stock the result of the borrowed money, and

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas.

---

indirectly, the whole, or a considerable portion of, the tax on the mortgage. And yet, reduced to the last analysis, this is not regarded as double taxation, because value is taxed each time. At all events, it is unquestionably the legal rule in Ohio. It is not impossible that a large portion of the stock of this corporation may be held by residents of this state. In such case, if the claim of the defendant should prevail, large amounts within the state, represented by these shares, would escape taxation, while the shares of stock held by our citizens in foreign corporations which happen not to have property within the state, would bear their full burden. Such a rule would not tend to uniformity or equality of taxation. And, inasmuch as the tax on the property of the corporation within the state is not a tax on the shares, and is not by the statute in terms made an equivalent, and inasmuch as the manifest purpose of the legislature was to reach *all* "investments in stocks" in some form, we think a rational construction of the statute can lead to no other conclusion than that the telegraph stock cannot come within the purview of the exemption clauses.

The case of *Bradley v. Bauder*, 36 Ohio St. 28, is in point, and, as we think, so completely covers these questions that but little is left for us but to apply the work of others. The syllabus is: "By the provisions of the act of May 11, 1878, an owner, residing in Ohio, of shares of stock in a foreign corporation, is required to list the same for taxation, notwithstanding the capital of the corporation is taxed in the state where the corporation is located." The act of 1878, here referred to, embodies substantially the provisions of the act of 1859. Every question we have here, as to telegraph stock, was present there, though the wording of a paragraph in the statement of facts, on page 28, might lead to a contrary impression. An examination of the record shows that among the shares of stock, taxation of which was sought to be enjoined in that case, were shares of the Adams Express Company, averred in the petition to be, and well known to be, a foreign corporation having lines running through this state upon which it did business, and having property within the state upon which it paid taxes here. It was

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas.

---

urged by counsel for plaintiff in error, in his printed brief, that it was a company created by and located in the state of New York, and reasoned that the fact that it paid taxes in that state, and in this state upon its property employed in its business here, ought to exempt its shares. The case was determined upon a general demurrer to the petition which was sustained, and judgment without dissent, given for defendant. If as to either class of stock, taxation of which was sought to be enjoined, the court had been of opinion that it should be exempted, that conclusion would have been followed by the overruling of the demurrer. Necessarily, therefore, this question was passed upon. It is within the letter, and, as we think, the logic of both the syllabus and the opinion. That it isn't given importance in the opinion may be owing to a belief in the mind of the learned judge who reported the case that it was not of consequence. And it was not, if the principle announced in the case is correct. We believe it to be, and, in reaching the conclusion hereinbefore indicated as to the telegraph stock, we but follow the logic of the decision and judgment in this case.

To like effect is the holding of the Supreme Court of the United States in *Sturges v. Carter, Treas.*, 114 U.S. 511. The plaintiff in that case, Carter, treasurer, the successor of Lee, brought suit in the Common Pleas of Richland county, to collect taxes on stock in the same telegraph company. Sturges removed the case to the Circuit Court of the United States, where it was tried before Judge Baxter. Judgment being rendered against the defendant, he sued out a writ of error to the Supreme Court, where, at the October term, 1884, by the unanimous opinion of the court, the judgment was affirmed. The syllabus is as follows: "The provision, section 59, Act of April 5, 1859, of Ohio, that 'no person shall be required to list for taxation any certificate of the capital stock of any company, the capital stock of which is taxed in the name of the company, does not apply to shares in a foreign corporation which pays taxes in Ohio only on the portion of its property which is situated there.'"

With due deference to the contrary opinions of the learned

counsel so vigorously expressed in argument in this case, we may be allowed to give our assent to the judgment of the Supreme Court upon the facts, and to express respect for the decision as authority.

As to the railway shares, it is further claimed that the language of section two of the act (heretofore quoted) defining the phrase "investments in stocks," in terms excludes them from taxation here, and that they are of the class which sections three and fifty-nine authorize the holder to omit. This, because the word "which" in the clause "for taxation of which no special provision is made by this act" refers, not to "shares" but to the capital stock of the company, and, therefore, "investments in stocks" includes only stocks in corporations as to the taxing of the capital stock of which no special provision is made by law; that there is a special provision made by law for the taxing of railroad companies; hence the shares of stock of such companies in the hands of individuals are not taxable. Applying grammatical rules to this sentence, it would seem natural to refer the word "which" to its immediate antecedent "shares"; and this construction finds support by a consideration of the words following, viz.: "held by persons residing in this state," etc. Shares might be held by persons here; the capital stock could not be. However, we are not impressed with the prime importance of abstruse and ingenious distinctions in regard to the wording of section two. There may be apparent objections to any of the differing constructions sought to be given to this clause. But, however it be construed, we think the result is the same. If it be conceded that the word "which" should be referred back to the words "the stock or capital," then, taking that clause in connection with the portion of the ninth clause of section three, and the first clause of section 59, and construing the whole legislation in the light of the constitutional requirement before referred to and of the previous decisions of this court, the "special provision" must be one which relates to an Ohio corporation proper, one as to which, as in *Jones v. Davis*, 35 Ohio St. 474, the state had exercised, or might exercise, the right to tax the capital stock in the name of the company.

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas.

---

Now the "special provision" for the taxation of railroads, is that provided by sections 2770 to 2776, Revised Statutes, and is, in substance, that the auditors of the counties through which the road passes meet annually as a board of appraisers and assessors and proceed to ascertain all the personal property, which includes road-bed, water and wood stations, and such other realty as is necessary to the daily running operations of the road, moneys and credits, and undivided profits of the company, and the actual value thereof in money. The board may require the president, secretary, treasurer, receiver, and principal accounting officer to produce a detailed statement, under oath, of all the items constituting such property, moneys, credits and their value, and may examine under oath such officer, and the books and papers of the road. The value of all such property is then apportioned by the board among the several counties, so that to each city, village, township and district shall be apportioned such part as shall equalize the relative value of the real estate, structures, and stationary personal property, in proportion to the whole value of the same in the state, and the rolling stock is apportioned in the same proportion and in a similar manner. When any company has part of its road in this state and part without, the board is to take the value of the property, moneys and credits thus ascertained, and divide it in the proportion the length of such road in the state bears to the whole length, and determine the principal sum for the value of the road in the state accordingly, equalizing the relative value between counties, etc., as before indicated.

It will be seen at a glance that this scheme has for its object the ascertainment of the value, and the taxation according to that value, of the property of the road within the state only; the marshalling of the entire property and its valuation being simply an ingenious mode of ascertaining the amount and value of the property within the state, to be taxed. That which lies without is first included, because the proper equalization as to value can not be made without it, and then it is deducted. The result is the ascertainment for taxation of the proportion of value

properly taxable within the state. It works out for the railroad companies herein named, taxation of a little over ten per cent. of the value of the capital stock of The Cincinnati, Indianapolis, St. Louis & Chicago company, about twenty-one and one-half per cent. of the value of The Pittsburgh, Fort Wayne & Chicago company, and of The Lake Shore & Michigan Southern about twenty-five per cent. A "special provision" attended with such results can hardly be regarded as one which embraces taxation of capital and property of a company, nor one which furnishes an instance where the capital stock is taxed in the name of the company.

As to The Lake Shore & Michigan Southern Railway Company, it is further insisted that it is not a foreign, but a domestic, corporation; and as it has returned and listed and paid taxes on its immense property lying within the state, in conformity with the statute, the shares in the hands of stockholders cannot be taxed. The finding of facts does not in express terms declare that this company is organized in Ohio, but we understand the fact so to be. That is, it is an Ohio corporation in the same sense as are all consolidated railroad companies made up in part of an Ohio company. It does not, however, necessarily follow that they are domestic corporations in all aspects and for all purposes. Such corporations derive their corporate existence and all their powers from domestic law. A consolidated railway company, composed of companies of this and other states, derives its corporate existence and rights from the laws of the respective states in which its line of railway is located, and is, therefore strictly speaking, an interstate corporation. It is not domesticated in one, but in several states. It is not the creature of one, but of all the states in which it, in part, exists, and has been enabled, by their respective statutes, to become a corporation for the ownership and management of an interstate line of railway. Such is the character of The Lake Shore & Michigan Southern Railway Company. It is a corporation of the states in which it is located, from Buffalo to Chicago. The consolidated company, when the agreement of consolidation is made and perfected, and the original or a copy filed with the secretary of state, is to

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas.

---

possess within this state all the rights, privileges and franchises, and be subject to all the restrictions, liabilities and duties of a railroad company. A copy of this agreement shall be received as evidence that such consolidation was authorized by the laws of the several states within which the companies were chartered. Such company must establish a principal office within the state, and suits may be brought against it in the courts of the state as against other companies. That portion of the road in this state, and all its real and personal property, shall be listed for taxation and taxed in the same manner as the road and property of other railroad companies in the state, and the rolling machinery is to be listed at a valuation which will give such proportion of the value of the whole as the length of line in the state bears to the length of the whole line. But there is no requirement that it shall list its capital stock, nor, for taxation here, all its property; for that purpose it is to return only such as is within the state, the return of any that may be without being for the purpose of ascertaining the proportional value of that which is here. This, by the terms of the act under review, was required of every foreign corporation, and therefore, it imposes upon such consolidated company no burden as to taxation beyond that imposed upon every foreign corporation having property within the state. Though it is required to have a principal office here, its general business may be done elsewhere. It may hold millions of credits without the state, and they are not taxed here. Not so, to the same extent at least, with a strictly domestic corporation. Its *situs* is here to all intents and purposes. If it owns credits, shares for instance in the stock of foreign corporations, (which is often the case, whether there be legal warrant for it or not,) it must list the same here as fully as the private citizen is required to do, and of course all visible property is taxed here. So that, it cannot be said that the power of taxation over a consolidated company is the same, or as extensive as, that over a strictly domestic company.

Again, by the act of consolidation, the shares of stock in the consolidating companies, held by the shareholders, are surrendered, and in their place are substituted shares in the



consolidated company. That which before was, in a sense, represented in the railroad and the other property in Ohio only, is now, in the same sense, represented in the entire railroad and property of the consolidated company. The old Ohio company has out no certificates of stock whatever; indeed, it has ceased to exist, for, on perfecting the agreement, "the several corporations shall be deemed and taken to be one corporation." That one is the *new* one. The old is abolished and its charter extinguished. The new one thus created, stands, in all respects, in the view of the law, as if the old companies had never existed. (Swayne, J., in *Shields v. Ohio*, 95 U. S. 324.) The present company, if treated as an Ohio company, has out no stock, and it is, therefore, not the stock of an Ohio company which is sought to be taxed. The Ohio stockholder, (if it may be said that he has any legal interest in the corporate property), has no more interest in or control over the road and property in this state than in that lying in the other states, nor have the stockholders residing in the other states any less interest in the Ohio property of the corporation than in that lying without. Upon a dissolution of the corporation the stockholders in Ohio would not take the property here or its proceeds, nor would it fall to the original stockholders in the old Ohio company,—the Lake Shore company. On the contrary, all stockholders of the consolidated company, wherever residing, and by whatever company of the consolidation their original stock was issued, would be interested alike in the whole residuum, in proportion to their respective shares.

It is thus made apparent, as it seems to us, that the question whether this railway stock held in Ohio is taxable here, is not to be answered in the negative merely because it is ascertained that the corporation was incorporated under the laws of Ohio. There still devolves upon the shareholder the burden of showing, clearly and without question, that the results following such organization bring the shares within the exemption, taxability being the rule, exemption the exception. Has this been done? We think not. It is true that the property of the corporation entered for taxation in Ohio is substantial in character, and that the amount paid by the company as taxes

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas.

---

on that property is large. But the greater portion of the company's entire property, about three-fourths in value of it, lies without the state. And we are unable to perceive that the reasoning of the court in *Sturges v. Carter*, *supra*, and the logic of *Bradley v. Bauder*, *supra*, is not applicable to this stock as well as to that of the telegraph company. If, as in effect is held in the latter case, and directly held in the former, the exemption clause of section 59 does not apply to shares in a foreign corporation which pays taxes in this state only on the portion of its property which is situated here, and if, as we are constrained to conclude, the Lake Shore & Michigan Southern Railroad Company, as to the matter of taxation, is essentially a foreign corporation, it is difficult to see why shares in that company, held by our citizens, are not taxable here. To hold them exempt would, we think, require, in effect, an overruling of those cases. The railway company is not, any more than is the telegraph company, required to return all, or substantially all, its property for taxation in this state. The finding of fact is that this corporation "has returned and listed its property in the state of Ohio for taxation, consisting of its line of railroad, road-bed, depots, station-houses, and the necessary real estate for the same, rolling-stock, and other property, of the value of \$13,000,000," while its capital stock is \$50,000,000. In a word, the consolidated company does not fall within the description of the exemption clauses of the statute.

Marked stress is laid in argument, as supporting the contention of the insurance company, upon the case of *Frazer et al. v. Seiburn et. al.*, 16 Ohio St. 615. A full analysis of this case would require much space, and it would not, it seems to us, prove profitable. The case construes the Act of Congress of 1861, authorizing the formation of national banks, and clauses of the taxing laws of Ohio under consideration in the cases at bar, and gives a rule for applying the qualifying clauses of the national bank act, and holds that the clause limiting taxation of shares in national banks to a rate not greater than that imposed upon shares in state banks, means that as the taxation of such shares is provided for under the state tax law by tax-

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas.

---

ation upon the banks themselves, which have the right to deduct from their capital for taxation, real estate and government bonds held by them exempted by United States law, so, in assessing shares in national banks the same deduction shall be made. And where, under the state law imposing taxes upon shares in national banks, the tax is in excess of the rate imposed upon the banks of the state, the payment of such excess might be enjoined upon payment of a sum which would be a fair equivalent for the tax on the state banks.

With due respect to the claim of counsel, whose ingenious argument upon the point we have read with much interest, we cannot see that the holding noticeably aids his contention, or gives a rule determining adversely the question of taxing shares in a foreign corporation. Because the law of the United States fixed a rule for the taxation, by a state, of shares in national banks located within such state, and that rule authorized exemptions in order to conform taxation of federal bank shares to the rule applied to shares in state banks, it does not follow that our statute should be so construed as to exempt shares in a foreign corporation, as to which there is no requirement of federal law whatever. In the bank case our court but bowed to the controlling authority of the general government. It held the law in that case in obedience to that superior power, in the same breath expressing regret because of the necessity.

Nor does a reading of the opinion in the bank case impress us that the learned judge who wrote it anticipated that such a construction as is here claimed could be given to it. We quote from Welsh, J., on page 622. Speaking of our tax law, he says:

“It provides for a tax against certain corporations and companies upon their *capital*, and for a tax against the shareholders, upon their *stock*, in those corporations and companies that are *not* so taxed upon their capital.

“\* \* \* The intention manifestly was to subject the capital employed by these corporations and associations to a *single* taxation—some of them in one form, and some in another—and not to tax any of them *twice*. It is the unmistak-

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas.

---

able intention manifested in our tax legislation for the last twenty years—the central idea of our system of general *ad valorem* taxation—to tax every person upon what he is worth. In a system like ours, where intangible as well as tangible property is taxed, some forms of *double* taxation are unavoidable; but the object should be—and such seems to have been the general aim of all our late legislation upon the subject—to avoid double taxation whenever it is *practicable*, and as nearly as may be, to tax all according to their actual wealth. That object is best attained in case of a corporation, or joint stock company, by taxing the stockholders—the persons who own its property, upon the full value of their shares therein, including, of course, their interest in the franchise or privilege, and in all tangible property owned by the company; and by taxing the corporation also upon the value of such tangible property.

\* \* \* This is the rule adopted by the act of congress in question, and it seems to us a just and fair rule. The act of 1865, by subjecting shareholders in the national banks to such a tax, places upon the owners of those banks, the shareholders therein, no more than their just proportion of the public burden of taxation; and we regret that any technical reasons, growing out of the taxation of the few remaining state banks, should stand in the way of its enforcement.”

This construction of the exemption feature of the act of 1859, confines the exception to *home* corporations, and clearly recognizes the distinction between the taxation of shares and the taxation of capital stock which we have sought to point out. This application of the exemption clauses is more fully expressed in the opinion of Boynton, J., in *Bradley v. Bauder*, *supra*, from which we quote the following: “In view of these provisions, it is perfectly obvious that shares of stock in corporations, wherever located, owned by our citizens, are subject to taxation, except in cases falling within the operation of the proviso of section 13, unless the statute is open to constitutional objection. The proviso to the 13th section, exempting from taxation any share or shares of stock in any company, the capital stock of which is taxed in the name of the company, is a substitute for the same provision found in

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas.

---

the first clause of section 59, of the act of 1859. It had, in that act, as in the act of 1878, no reference to shares of stock in foreign companies."

In the case of *Jones v. Davis, supra*, the question at issue was as to the taxability of shares in an elevator company, organized under the laws of this state, all of whose real and personal estate necessary for the daily conduct and operation of its business, together with moneys and credits, was listed by the company for taxation here, and the court held that the owner of shares of the capital stock of the company was not required to list his shares for taxation. So that, as to the owners of stock in home corporations, having their property all in this state, this case is authority warranting such owners to omit to list their shares. The decision does not determine whether any different result would have followed had the corporation possessed substantial property without the state. And this presents an inquiry much pressed in argument. A decision of the cases at bar does not make necessary a conclusive answer to it here, and it may not be possible to formulate a rule, or give a construction to the act, which will bring about perfect equality in all instances. Take, for example, the case of a corporation having in this state, and subject to its taxing laws, nearly all its property, and only a small portion without; if the shares are taxed because it is a *foreign* corporation, the result has the appearance of double taxation, while, in case of a corporation having in the state a trifle of its property, the greater portion being beyond the limits, and the shares held in this state are not taxed because it is a *home* corporation, apparently there is property in the state which escapes taxation. But these are extreme instances, and extreme cases do not prove satisfactory tests. However, while recognizing grounds for differences of opinion, and conceding that this construction is not, as to the phase of the subject, in all respects, satisfactory, as conclusion, we are disposed to be content with a construction of these exemption clauses which will be in accord with the opinion in the case last cited and with that indicated in the opinion in *Bradley v. Bauder, supra*, and treat them as applying to all corporations which are

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas.

---

strictly domestic, but to none others, and thus to exempt from taxation only "the shares of stock in corporations where the state had exercised the right to tax the capital stock in the name of the company." This construction applies them to that class of corporations over which the state may have, as to their capital and property, as well as management, entire control. In this view, when the general assembly uses the words "capital stock or property of any company or corporation which is required to list or return its capital and property for taxation in this state," it refers to that class of corporations whose entire capital and property it is possible to require to be listed here. This is not possible of a railroad company made up by consolidation of an Ohio company with companies of other states. As to this feature it is as essentially foreign as is a strictly foreign corporation holding property within the state. A construction which would result in the exemption of these shares, would, we think, be at war with the language of the statute, and would, besides, result, in many cases, in releasing from taxation large amounts of property held in the state, for which there would be no equivalent. Of course we do not overlook the fact that, under the rule suggested, some property owned by domestic corporations may escape taxation because of being without the state, and so beyond reach. This will be found true as to exceptional cases, but treating them as a class, their capital and property are all here.

The fact that some property of domestic corporations would thus avoid taxation is urged as a reason for the release of the railway and telegraph shares here on the ground, that, if held, the rule would result in unequal taxation, and, it is further urged that to subject these shares to taxation would result in driving a large volume of capital from the state. The force of this argument is not perceptible. Whether the tendency of holding such shares taxable will be to drive capital from the state, or will, on the other hand, induce such holders to invest in stocks of home corporations, we need not inquire, for the court's duty is not to declare that to be law which it may think may prove advantageous to the people, but to declare the law as it finds it. Nor can the court be called upon

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas.

---

to equalize taxation. The shares in question are held subject to taxation because, as we think, the law says they are so subject. Those of domestic corporations are held exempt because the law says they are to be excepted. If this works inequality, or if it tends to drive certain species of capital from the state, the remedy, if any, is with the law-making power, and not with the courts. Nor does the fact, if it be so, that other property escapes, necessarily render this tax invalid. *Exchange Bank v. Hines*, 3 Ohio St. 1; *Wagoner v. Loomis*, 37 Ohio St. 571. "It cannot be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances; and if inequality in result must defeat the general law, then taxation becomes impossible, and governments must fall back upon arbitrary exactions." Cooley on Taxation, 221. It is probable that the lightening of the burden of taxation attracts the owners of property to locate, and draws foreign capital to the state. Referring again to the taxation of mortgages, it is plausibly urged by many, that if the tax on mortgages in the hands of residents were abolished, capitalists having money to loan would be attracted here from other localities and the rate of interest would fall, thus giving our enterprising people the use of more capital and at a less rate of interest. If this be conceded, should the courts therefore declare that mortgages, or notes secured by mortgages, given to residents of Ohio, can, under our statutes, be exempted?

Fear is expressed by counsel that great wrong and injustice will be done the stockholders, in these and similar corporations, by taxing their shares, because, they cannot know whether the corporation has listed *all* its property, and they should not be held accountable for its default. We think the fear unsubstantial. The stockholder need know only that the corporation, under the rule applying the exemption to stock in home companies, is *required* to list. Where it is so required, presumably the capital stock of such company is taxed in the name of the company; and where such duty devolves upon the corporation, the taxing officers will, in case of default, follow the corporation, not the individual stockholder.

---

Lee, Treas. v. Sturges—Insurance Co. v. Ratterman, Treas..

---

It is insisted that railroad capitalists have been encouraged by the state to consolidate railroad companies, and having invested their money in such stocks under the belief that they were non-taxable, it would now work an injustice to assess a tax upon them. If, by agreeing to consolidation, any stockholders surrendered non-taxable stock, taking in exchange stocks which turn out to be subject to taxation, presumably they anticipated other advantages which would more than compensate, and, without doubt, this anticipation has been realized in most instances. *State v. Railroad Co.*, 66 Me. 488; *Railroad Co. v. Maine*, 96 U. S. 499.

The allegations in the petition of the insurance company as "to uniform construction" by the people and taxing officers, were, so far as competent for consideration by the court, matter of evidence, save where they might be taken judicial notice of by the court; hence the sustaining of the motion to strike out was not error. The omission of the taxing officers of the state in previous years to assess this property cannot control the duty imposed by law upon their successors or the legal construction of a statute under which its exemption is claimed. *Vicksburg Railroad Co. v. Dennis*, 116 U. S. 665. If it could, the consequence would be the lodging in their hands of the very power of exemption which the general assembly alone can validly wield, and that under the limitations of the constitution. Nor can laches be imputed to the state. "The general principle is, that laches is not imputable to the government; and this maxim is founded not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions." *United States v. Kirkpatrick*, 9 Wheat. 735; *State ex rel. Lott v. Brewer*, 64 Ala. 287; *Eastern Bank v. Commonwealth*, 10 Barr. 443; *Canal Co. v. Commonwealth*, 50 Pa. St. 399; *Dennis v. R. R. Co.*, 34 La. Ann. 954, 958; *Finley v. Philadelphia*, 32 Pa. St. 381. Even if it were error, the plaintiff in error seems to have had full



benefit of it as if pleaded and proven. It is probable, however, that the claimed "uniform construction" has not been quite so "uniform" as counsel suppose. At least in one of the counties through which The Pittsburgh, Fort Wayne & Chicago Railway passes, a different view obtained. In the year 1882 an action was brought to enjoin the county treasurer from collecting taxes on stock in that company owned by the plaintiff, and which the assessor had returned as subject to taxation. A demurrer was filed to the petition. The stockholder's case was presented by two as able and experienced lawyers as practice in that part of the state to a common pleas judge of exceptional capacity. The demurrer was sustained, and the case was not further prosecuted. The extent of the claim for "uniform construction" seems to be that in case of doubt as to proper construction, the construction by state and county officers should prevail. This has been at large argued and considered. This construction, counsel urge, has been known to the general assembly, and had it been the legislative will to tax such shares, further legislation would have been had to that effect. With equal pertinency this consideration could have been pressed in the case of *Worthington v. Sebastian*, *supra*, and in *Bradley v. Bauder*, *supra*. The argument lacks force as applied to this subject at this time. It somewhat tends to persuade, but does not convince.

Our conclusion is that there is not such doubt present as will make this claimed "uniform construction" available as against the claim for taxes here made. But the record in the case of The Western Insurance Company shows no ground for penalty. The cross-petition was apparently predicated on section 2859 of the Revised Statutes, which makes no provision for a penalty. It does not appear that the duplicate showed an entry by the auditor as contemplated by section 2855. Hence no penalty can be allowed.

In the case of *Lee v. Sturges*, a judgment will be rendered for the amount claimed, but without interest. In the other case the judgment of the superior court will be modified by

---

State *ex rel.* Construction Co. v. Rabbitts.

---

deduction of the amount of penalty included in the judgment, and otherwise affirmed.

OWEN, C. J., and DICKMAN, J., dissent.

46s	178
46s	685
46	178
50	334

---

STATE EX REL. CONSTRUCTION CO. v. RABBITS.

*Validity of Act of March 19, 1887, amending § 550, Rev. Stats.—Amendment of remedial statute—Construction of the language “unless so expressed,” contained in § 79, Rev. Stats.*

1. The act passed March 19, 1887 (84 Laws, 129), amending § 550, Revised Statutes, was duly adopted by the General Assembly, and is a valid law.
2. The statute relates to the remedy, and must be construed in connection with § 79, Revised Statutes; so that, the language therein contained, “That in every instance where a judge of the court of common pleas is interested in the event of a cause \* \* pending before the court in any county of his district,” it may, “unless there is a judge residing in the county not so interested,” be removed to another county, does not, though general in form and expressed in the present tense, apply to a pending action, where the state of facts, constituting such ground of removal, existed at the adoption of the statute. No generality of language used in an amendment relating to the remedy, will, under § 79 Revised Statutes, make it applicable to a pending action, prosecution or proceeding; to make it so applicable the intention must be expressed in a provision to that effect.

(Decided January 8, 1889.)

IN MANDAMUS.

MINSHALL, J. The object of this suit is to compel the removal of an action from the county where commenced to an adjoining county of the same sub-division of the judicial district, under the act passed March 19, 1887, amending § 550, Rev. Stats. (84 Ohio L. 129.) The action sought to be removed, is a suit by a creditor against the stockholders of an insolvent company, The Springfield, Jackson & Pomeroy R. R. Co., which was commenced December 31, 1879, in the Court of Common Pleas of Clark County. On March 28, 1887, the relator, on leave granted by Judge Hawes, in an adjacent county, filed an answer and cross-petition as a creditor of the

company to a large amount, asking, in its favor and that of all the other creditors, to enforce the individual liability of the stockholders; and on April 1, 1887, after filing the affidavit required by the statute, requested the removal of the cause to an adjoining county of the same sub-division, that being as stated, practicable, on the ground, as stated in the affidavit, that Charles R. White, the judge of the common pleas of the county, is interested in the event of the cause, being one of the stockholders of the company; and there being no other judge in the county not so interested. The clerk, respondent in this action, refused to transmit the papers as requested on the grounds, as appears from his answer to the alternative writ, (1) that the act of 1887, amending § 550, Rev. Stats., did not become a law by reason of certain irregularities in its passage; (2) that it does not apply to pending actions; and (3) that the relator was not a party to the suit sought to be removed, the judge granting the leave to file the pleading, having, as claimed, no power to do so, the common pleas in Clark county being in session at the time; and that Judge White, though a subscriber to the stock of the company, was not interested, no certificate of stock having been issued to him.

Of the first and third grounds of defense, little need be said: The amendatory act was signed by the presiding officer in each house; and there is nothing appearing upon the journal of either, that would warrant us in holding that it did not become a law. *State ex rel. Herron v. Smith*, 44 Ohio St. 348. As to the third ground: The suit sought to be removed is necessarily prosecuted for the benefit of all the creditors of the company, and if leave was improperly granted the relator to become a party and to answer, the remedy is to move the court in which the action is pending to strike the pleading from the files and dismiss him from the action.

The second ground does, however, as we think, constitute a defense, and the writ must for such reason be refused. The suit was commenced in 1879, and the facts now relied on, constituting a ground of removal, have existed since the time Judge White became a judge of the court of common pleas, which was May 3, 1885. The law then in force, § 550, as

amended February 7, 1885, authorized a removal on the ground of a judge of the court of common pleas being interested in the event of a cause pending before the court in his district, only where there was "no other judge in the same," that is, his "sub-division, not so disqualified." It is not averred in the pleadings, nor is it claimed, that such was or has been the case since Judge White entered upon his term. The removal is sought on the ground that Judge White is interested in the event of the case, and that there is no other judge residing in the county where the cause is pending, not so interested. This is the ground provided by the act of 1887, amending § 550, Rev. Stats. This act, being an amendatory one, must be construed in connection with § 79, Revised Statutes, which reads as follows:

"Section 79. Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed; nor shall any repeal or amendment affect causes of such action, prosecution or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

The act of 1887, under which the removal is sought, unquestionably relates to the remedy, and hence, by reason of this section, cannot be made to apply to a pending action, unless so expressed in the act itself. This is admitted. But it is claimed, that the language "in every instance where a judge of the court of common pleas is interested in the event of a cause," used in the act of 1887, is general and in the present tense, and so necessarily applies to a pending action. But it is evident, as we think, that this is not the proper construction of the clause "unless so expressed," used in the section just quoted. It is a principle common to every enlightened system of jurisprudence that laws should be made to affect future and not past transactions, Sedg. Stat. Law, 160; and is incorporated in our fundamental law by a pro-

hibition against the passage of retroactive laws. But it is generally held that remedial statutes are not within the mischief intended to be avoided by the prohibition against retroactive laws, and such effect is generally given them, where the intention of the legislature to make them so applicable, appears from the language employed. *Rairden v. Holden*, 15 Ohio St. 207; Sedg. Stat. Law, 162 n. This rule with its exception has been embodied in our statute law, with this simple modification, introduced for the first time by the revision of 1880, that when the intention is to give to a repeal or amendment relating to the remedy, a retroactive effect, such intention must not be left to construction, but must be so expressed by a provision to that effect. No generality of language nor use of the present tense, can be accepted by the courts as a substitute for such express indication of the legislative intent. This, we think, is the only proper construction to be given this clause in the above quoted section. The provision has not merely the advantage of being a rule of certainty in construction, but also, of exciting the attention of the legislature, and begetting an inquiry as to the propriety of applying a given amendment of a remedial nature to pending actions, prosecutions or proceedings. And the history of the enactment of the act of 1887, will, of itself, illustrate the wisdom of this clause in section 79, of the Revised Statutes. The bill, when first introduced, contained an express provision making it applicable to pending actions; but this was stricken out by an amendment in the house where the bill was introduced; so that, we know that the legislature with its attention called to the matter, was unwilling to enact it in that form, and must therefore have intended that it should, under the provisions of the above section, apply to future cases only.

But it is claimed that under the act that was in force at the commencement of the action sought to be removed, which was the act of 1860 (S. & C. 387) it could be removed on the facts stated in the affidavit—the interest of Judge White in the event of the cause—as this act, as did also the act by which it was repealed in 1880, authorized the removal of a cause when any judge of the court of common pleas in the district is in-

terested in the event of it; and, therefore, by the same reasoning, adopted by counsel for the respondent, the cause may be removed under the act of 1860; as the act of 1880, which repealed the act of 1860, does not make it apply to pending cases, nor does the act of 1885, which repealed the act of 1880, contain such provision. This reasoning would be unanswerable if the ground of the removal, on which the motion is now made, had arisen under the act of 1860, or that of 1880, for, in either case, there would have been a pending ground of removal, unaffected by the repeal of either statute under the provisions of section 79. *Bode, adm'x v. Welch*, 29 Ohio St. 19. It may be well enough to remark that the case just cited, arose before the enactment of section 79 contained in the revision. The statute then in force on the subject was the act of 1856 (S. & S. 1), and did not contain the clause in regard to repeals or amendments relating to the remedy, found in the above section of the revision. The court held, that the amendment of March 30, 1875 (72 Laws, 161), taking away the right of appeal from the judgment of a justice of the peace, where the sum was less than \$100, did not affect the right to appeal from a judgment rendered before the passage of the act. It was held that, as to such judgment, there was a "subsisting right of appeal," unaffected by the amendment. But it cannot be said that there was a subsisting right to remove this cause at the passage of the act of 1887. No such ground as the disqualification of Judge White, existed under the act of 1860, or that of 1880. The facts constituting such ground arose for the first time, when Judge White became a judge of the court of common pleas, which was, as we have seen, after the act of 1885 became a law, and before its repeal. But the simple fact that a common pleas judge is interested in the event of a cause pending in any county of his district, did not, under that act, of itself constitute a ground for the removal of the cause to another county. It further required that it should negatively appear that "there is no other judge in the same sub-division who is not so disqualified." So that there was no ground

---

Hill v. Myers et al.

---

or cause for a removal, resting simply upon the disqualification of Judge White, pending under the act of 1885, to be saved by the operation of section 79 on the repeal of that act. And herein the case is distinguished from the case of *Bode, adm'x v. Welch*, and also, from the case of *Palmer v. State*, 42 Ohio St. 596. In the former case a judgment had been rendered from which there was a subsisting right of appeal; in the latter a prosecution was pending, applicable to the trial of which, the statute, subsequently repealed, provided certain grounds of challenge in impanelling a jury; and there being no provision in either amendment of the law making it applicable to pending actions, prosecutions or proceedings, it was held, in each case, that the repealed statute, and not the amendment, applied.

For the reasons stated, the writ must be refused and the petition dismissed.

WILLIAMS, J., not sitting in the case.

---

#### HILL v. MYERS ET AL.

*Decree subjecting separate property of a married woman—Occupation of same by her for a homestead before issuing order of sale—Application of homestead act to lands in co-tenancy.*

1. Where a married woman living with her husband, charges her separate property for the payment of a note executed by her and her husband jointly, if he has no homestead, she will be entitled, in an action on the instrument, to an assignment of a homestead in such property, when occupied by her as a family homestead before the levy of an execution, or before an order of sale was issued upon a decree specifically subjecting the property to the payment of the claim of the judgment creditor.
2. Where such separate property consists of an undivided interest in land, and there has been, without the knowledge of the judgment creditor, a voluntary partition between the tenants in common before levy of the execution or issue of the order of sale, the wife will be entitled to a homestead in the interest set off to her in severalty, subject to the creditor's right, upon proper issues made, to inquire and determine as to the justice of the partition.

(Decided January 8, 1889.)

ERROR to the Circuit Court of Hamilton County.

---

*Hill v. Myers et al.*

---

On December 2nd, 1880, the defendant John Myers was indebted to the plaintiff Ezra A. Hill, in the sum of nine hundred dollars. His wife Tabitha Myers, the other defendant, was the owner at that time of an undivided two-tenths of a tract of land in Hamilton county, Ohio, held in common by her and her husband's brothers and sisters. On the above named day, the husband and wife joined in executing to the plaintiff their promissory note for the amount so due, payable in three installments. Upon non-payment of the note according to its tenor, the plaintiff commenced his action in the court of common pleas against the makers, and in an amended petition, wherein was described by metes and bounds the lands above referred to, sought to have the two-tenths interest in the lands owned by Tabitha Myers subjected and applied to the payment of the note. In June, 1883, a judgment, upon appeal, was rendered by the district court, finding:

"That said Tabitha Myers made and executed the obligation set out and described in the petition and amendment thereof, and intended, and did thereby charge her separate estate, consisting of the premises described in the plaintiff's petition, with the payment of the amount of said obligation, and that the plaintiff became by virtue thereof entitled to have the same subjected and applied to such payment. That there is due to the plaintiff upon said obligation, the sum of \$1,083.60, with eight per cent. interest thereon from the 20th of June, 1883.

Wherefore it is considered that the plaintiff recover judgment against the said Tabitha Myers, charging the said premises with the payment of said sum and interest, and it is ordered and adjudged that the said Tabitha Myers pay or cause to be paid to the said Ezra A. Hill, the said sum of \$1,083.60, with interest as aforesaid, together with the costs of suit herein incurred and expended, within thirty days from the entry of this decree, and in default thereof that the sheriff of Hamilton county proceed to sell her separate estate in said premises as described in said petition as upon execution at law, and that an order of sale issue therefor upon the precipe of the plaintiff's attorneys."

The defendants filed their petition in error to reverse the



judgment, and upon bond, suspended its execution. The supreme court affirmed the judgment, and remanded the case to the court of common pleas for execution.

An order of sale being issued by the court of common pleas, and a motion to set aside the same being overruled, Tabitha Myers moved the court for an allowance of a homestead in the premises described in the order of sale, which motion for the allowance of a homestead the court ordered overruled, whereupon she appealed to the circuit court.

On appeal the circuit court ordered and adjudged as follows :

“ This day this cause came on to be heard on the appeal of the said Tabitha Myers from the order of the court of common pleas overruling her motion for an allowance of a homestead in the premises described in the order of sale, the motion of the said defendants, the agreed statement of facts, the pleadings and evidence, and was argued by counsel, and upon consideration the court finds the following facts : That after the affirmation by the supreme court of the judgment of the district court in this case, in the latter part of December, 1885, and the announcement of the decision thereon, counsel for plaintiff, informed counsel for defendant of such affirmation, and inquired of him whether or not an order of sale should be issued, to which defendant's counsel replied that ‘ It better not be done, ’ and requested delay upon statement that effort was being made to raise the money by loan for the payment of the decree ; that in pursuance of this request plaintiff's counsel did not issue any order of sale until May, 1886 ; that during the interval defendant's counsel informed plaintiff's counsel that the obtaining of the loan had been delayed, but was expected to be obtained ; and that, in consequence of this statement, the issuing of the order had been delayed ; that just previous to the issuing of the order of sale, defendant's counsel informed plaintiff's counsel that the loan could not be had, and that he might proceed with the sale ; that, in fact, defendant had made no effort during the period of this delay to obtain the loan, and had not expected to get one.

“ The court further finds that, pending these proceedings, without application to the court or the knowledge of the

---

Hill v. Myers *et al.*

---

plaintiff or his counsel, the defendant entered into an agreement for a voluntary partition with her co-tenants of the property described in the petition, whereby a tract in the northeast corner of the farm, including a small saw mill and a woodland, was set off and conveyed by said co-tenants in severalty to Mrs. Myers. And, upon that being done, the defendant, Myers, set the saw mill in operation and proceeded to cut timber suitable for a small frame house, and to construct it out of said lumber, beginning work in March and completing the house in May of 1886. And immediately thereupon defendants moved into it. Of all which proceedings of partition, improvement and occupancy of the premises neither plaintiff nor his counsel had knowledge.

"And after the defendant had moved into the house, the notice above stated was given to plaintiff's counsel, as to the intended loan, and the order of sale was thereupon issued. And that it is by reason of the improvement and occupancy aforesaid that the defendants claim their homestead in said property, she being a married woman, living on said premises with her husband, and not being the owner of any other homestead or property.

"The court also further finds that by reason of said occupancy of said premises, and the voluntary partition thereof as aforesaid, the defendant, Tabitha Myers, has become and is entitled to a homestead in said premises assigned to her, subject, however, to the right of plaintiff in these proceedings, upon proper issues made, to inquire and determine as to the justice of the partition made, as aforesaid, between the said Tabitha Myers and the co-tenants of said property.

"Wherefore it is ordered that upon the termination of such proceeding on the part of the plaintiff, if any be instituted, or upon the expiration of a reasonable time, to be allowed by the court, the sheriff of Hamilton county do assign a homestead to Tabitha Myers, in the portion of said premises assigned to her by her co-tenants."

To reverse this judgment of the circuit court, this proceeding is instituted.

*Bateman & Harper*, for plaintiff in error.

1. Plaintiff's interest in and claim upon the property was acquired and completed by her contract and the decree of the court before any homestead and homestead right existed. *Sellers v. Lane*, 40 Ohio St. 345; *Wildermuth v. Koenig*, 41 Ohio St. 180; *Gibson v. Mundell*, 29 Ohio St. 523; *Wilson v. Scott*, 29 Ohio St. 636; *Gunn v. Barry*, 15 Wall. 610; *Frost v. Shaw*, 3 Ohio St. 270; *Thompson on Homestead*, sec. 317; 42 Ohio St. 146-7; 32 *Id.* 440; 25 *Id.* 324; 24 *Id.* 488; 29 *Id.* 667; 38 *Id.* 420.

2. The homestead was fraudulently acquired. That the defendant was enabled to acquire her homestead by the fraud practiced upon the plaintiff, is clear from the findings of the court and the agreed statement of the parties. At the time of the affirmation of the decree by the Supreme Court the premises were confessedly subject to be sold clear of any exemption for the benefit of the plaintiff, and if process had been issued and sale immediately made thereon such would have been the result. By means, however, of false representations fraudulently intended, plaintiff was delayed in his process until they could, by the improvement and occupancy of the land, place the property beyond his reach and render his process worthless. It is difficult to understand how, in the administration of justice, a transaction of this kind can be upheld and such fraud be given effect and sustained by a court of justice. Myers himself was worthless, and had given one half of the estate ordered to be sold to his wife, who had purchased the other half. Mrs. Myers, herself, owned nothing but this land, which she had pledged for the payment of this debt. If the fraud which they have practiced, therefore, is effectual, it will substantially deprive plaintiff of relief. *Burnside v. Terry*, 51 Ga. 190; *Pratt v. Burr*, 5 Bissell, 36; *Edmonson v. Mechem*, 50 Miss. 34.

3. The homestead can not be allowed in this case, because the interest in which it is claimed is an undivided interest in premises held in common by Mrs. Myers and her husband's brothers and sisters. The proceeding was instituted against the property in that form, and a decree was entered in favor

---

Hill v. Myers et al.

---

of the plaintiff for its sale as two undivided tenths of a farm. The decree remains in that form, and the only execution which plaintiff can have thereon is for the sale of two undivided tenths. It is in this situation that an application was made for an assignment for a homestead. Such an assignment can not be had under the rule in Ohio. *Gaylord v. Imhoff*, 26 Ohio St. 317; *Mortley v. Flannigan*, 38 Ohio St. 404; *Thurston v. Maddox*, 6 Allen, 430; *Wolf v. Fleischer*, 5 Cal. 245; *West v. Ward*, 26 Wis. 580; *Thorn v. Thorn*, 14 Ia. 49; *Butt v. Green*, 29 Ohio St. 667.

4. The defendant presents the partition agreed between herself and her co-tenants. That is not binding upon plaintiff, who is not a party and has not been consulted with reference to it. The partition to be binding upon him must be one to which he is a party, either by voluntary assent thereto or by judgment of court against him. 1 Jones on Mortgages, sec. 706; *Colton v. Smith*, 11 Pick. 311; *Monroe v. Luke*, 19 Pick. 40; *Bradley v. Fuller*, 23 Pick. 1. We understand that the proceeding for partition and assignment of homestead cannot be joined in the same proceeding under any practice provided for by statute or known to the usage of our courts. 5 W. L. M. 25; 8 Am. L. R. 654. The purposes of the two proceedings are wholly distinct. One is a proceeding of creditors for the satisfaction of a debt. The other is a proceeding between the co-tenants for the separation of their interests in property.

*Wm. Cornell*, for defendants in error.

Married women are entitled to all the benefits of the exemption laws of the state of Ohio. 81 Ohio Laws, 65, sec. 5319.

Husband and wife living together may hold exempt from sale, on judgment or order, a family homestead not exceeding \$1,000 in value. Rev. Stats., sec. 5435. Also \$500 in value, of personal property, in lieu of a homestead. Rev. Stats., sec. 5441.

A debtor may hold, as a homestead, an undivided interest in land, if occupied by him as such. *McConville v. Lee*, 31 Ohio St. 449. The cases of *Gaylord v. Imhoff*, 26 Ohio St. 317, and *Mortley v. Flannigan*, 38 Ohio St. 404, cited by

counsel for plaintiff in error, do not apply, for the reason, that the property in question there was partnership property, and partners are liable for the debts of each other. Tenants in common are not liable for the debts of each other. They can sell and convey an individual interest in lands so held, without let or hindrance from their co-tenants. Such property is in every sense of the word individual property.

In *Comer v. Dodson*, 22 Ohio St. 615, it was held that after sale in partition a co-tenant could hold the proceeds of such sale exempt from execution as against a judgment creditor. Why, then, could the debtor not hold the property exempt before sale? If exempt when claimed in lieu of a homestead, why not exempt when occupied and claimed as a homestead? Because she does not own the whole tract, instead of an undivided interest, does not constitute a valid reason for turning her out of a homestead. Freeman on Executions, sec. 243. American Law Register, new series, vol. 1, p. 654. A tenant in common in the occupancy of any part of the estate so held, is a legal occupant as well as a legal owner. It does not matter in such a case whether a partition is legally made or otherwise.

The cases of *Selders v. Lane*, 40 Ohio St. 345; *Cooper v. Cooper*, 24 Ohio St. 488, and *Gibson v. Mundell*, 29 Ohio St., cited by counsel for plaintiff in error, do not apply, for the reason that the right to claim a homestead, arose after the lien of the creditor had attached to the property. Not so in the case at bar. In the case at bar, the debtor is Tabitha Myers. The property is hers. She has not disposed of the property. She makes the selection in right of the debtor.

The courts of Ohio have heretofore given to the exemption laws of the state a liberal construction in favor of those claiming under them. *Sears v. Hanks*, 14 Ohio St. 298, 301; Freeman on Co-tenancy, 54, 55, 56; *Wildermuth v. Koenig*, 41 Ohio St. 180.

A voluntary partition may be made by agreement of all the parties to the co-tenancy. Freeman on Co-tenancy, secs. 393, 394.

Lien holders are not deprived of their liens by partition, whether made by order of court or by the voluntary acts of the parties owning the joint property. Freeman, secs. 415, 478, 479; *Cradlebaugh v. Pritchett*, 8 Ohio St. 646-650; *Comer v. Dodson*, 22 Ohio St. 615, 622.

Whatever a court will compel parties to do, when applied to, will be upheld if done by the parties without the intervention of a court. *Turpin v. Turpin*, 16 Ohio St. 270; Storey on Equity Jurisprudence, sec. 1357.

DICKMAN, J. In June, 1883, the district court, on appeal, found that Tabitha Myers made and executed the obligation set out in the petition, and intended and thereby charged her separate estate with the payment of the amount of the obligation; and that the plaintiff, by virtue thereof, became entitled to have her separate estate subjected and applied to such payment. It was further considered by the court, that the plaintiff recover judgment against Tabitha Myers; and it was ordered and adjudged, that she pay or cause to be paid to the plaintiff, within a given time, the sum found due him, and in default thereof, that the sheriff proceed to sell her separate estate described in the petition, as upon execution at law; and that an order of sale issue therefor upon precipe.

Subsequently to the rendition of this judgment, but prior to the issue of an order of sale, Mrs. Myers entered into an agreement for a voluntary partition with her co-tenants of the property described in the petition, whereby a tract in the north-east corner of the farm was set off and conveyed to her in severalty. And in the month of May, 1886—an order of sale not having then been issued—the defendants had constructed a small frame house on the land so set off, and moved into it, and occupied it as a family homestead. By reason of such improvement and occupancy, as husband and wife, the defendants claim that a homestead in the property should be assigned to Mrs. Myers, neither of them being the owner of any other homestead. It is contended, however, by the plaintiff, that under such a state of facts, the wife is not entitled to a homestead in the premises set off to her in severalty.

Section 5438 of the Revised Statutes provides, that, "the officer executing any writ of execution founded on a judgment or order shall, on application of the debtor, his wife, agent, or attorney, at any time before sale, if such debtor has a family, and if the lands or tenements *about to be levied upon*, or any part or parcel thereof, constitute the homestead thereof, cause the inquest of appraisers, upon their oaths, to set off to such debtor, by metes and bounds, a homestead not exceeding one thousand dollars in value."

Construing the language of this section, it was held in *Wildermuth v. Koenig*, 41 Ohio St. 180, that a judgment lien attaching before the realty has been impressed with the characteristics of a homestead, is not such a lien as precludes the allowance of a homestead; and that real estate having the quality or status of a homestead before it is "about to be levied upon," or seized under an order of sale, should be set off for the use of the debtor's family.

It is contended that before the defendants had taken any steps toward the acquisition of a homestead, the plaintiff had acquired an interest in the estate equal to a levy, by the filing of his petition, and that the decree of the court was entitled to the dignity and force of a levy. By executing the note or obligation, Mrs. Myers did not direct out of what it was to be paid, or by what means it was to be paid; and it would not be correct, according to legal principles, to construe a contract to pay, into a contract to pay the debt out of a particular property so as to create a lien upon that property. She gave no mortgage, nor executed any other instrument which was equivalent to constituting a specific lien, nor did the contract made by her become a specific lien upon her separate estate. *Maxon v. Scott*, 55 N. Y. 247; *Todd v. Lee*, 16 Wis. 480.

If no personal judgment could have been awarded against her and enforced by execution, it might have been proper to invoke the remedy in equity of specifically subjecting her separate property. But under the statutory provisions herein considered, authorizing a personal judgment against a married woman followed by execution where the action concerns her separate estate, an effective remedy is afforded, and a creditor

---

Hill v. Myers *et al.*

---

should not, by adopting the form of chancery procedure where he has no specific lien, be permitted to hold her separate estate to any greater extent or by a firmer grasp, than he could, under like conditions, hold the property of her husband or that of an unmarried woman.

By virtue of the amendments of section 28 of the Code of Civil Procedure, which are substantially embodied in sections 4996 and 5319 of the Revised Statutes, a radical change has been effected in the remedy against married women. Though the object of this legislation was not to enlarge or vary the liabilities of a married woman, it fundamentally changed the form of the remedy. *Jenz v. Gugel*, 26 Ohio St. 527; *Allison v. Porter*, 29 Ohio St. 136. The disabilities of coverture are so far removed, that where the action concerns her separate property, a personal judgment may be rendered against her in all cases where such judgment would be proper were she a *feme sole*. Such judgment may be enforced in all respects as if she were an unmarried woman. Execution may be issued against her separate property and estate, to the same extent as against the property of her husband, were the judgment rendered against him; and the same rule will apply to her for the purpose of setting off a homestead in her property about to be levied upon, that applies to her husband. In instituting suit against her, it is enough to aver that she has separate property subject to be charged, without describing any specific piece of property, as it is not necessary by decree to subject any particular piece. *Corn Exchange Insurance Co. v. Babcock*, 42 N. Y. 613 (appendix).

But in proceeding by way of execution against the wife's separate property, the law has, in a liberal and humane spirit, guarded all her rights of homestead. It is provided by section 5319, *supra*, that she shall be entitled to the benefit of all exemptions to heads of families. Before levy of execution or seizure under an order of sale, she may impress upon her land the homestead character, so that, upon her application at any time before sale, a homestead shall be set off to her by metes and bounds. And not only may she before such levy or seizure dedicate and secure a homestead by visible occupancy, in



the land of which she holds the title; but if she has become the owner of the superstructure of a dwelling house occupied by her as a family homestead, although the title to the land is in another, she will be protected in the enjoyment of her homestead as against the judgment creditor.

With the changed remedy against a married woman, allowing a personal judgment followed by execution, goes *pari passu* the statutory protection of her homestead. And where no specific lien upon her separate estate has been created, the force and effect of the statute can not be frustrated, by setting out in the petition a description of specific separate property and rendering a decree that such property shall be applied to the payment of the wife's obligations, where she has asserted by use and occupation a right of homestead before the issue of an order of sale. To such a decree we do not attach the effect of a levy, nor can the wise and benevolent policy of the law be thus defeated. In authorizing a homestead to be set off to the debtor in the lands or tenements "about to be levied upon," the statute contemplates, that he may establish his right to a homestead, by use and occupation of the property before steps have been taken by a levy or seizure under an order of sale to enforce the judgment. It is to the enforcement of the decree or judgment that the prior use and occupation of the property for a homestead must be referred.

It is urged, however, in behalf of the plaintiff, that the homestead cannot be allowed in this case, because the interest in which it is claimed is to be regarded as an undivided interest in premises held in common by Mrs. Myers and her husband's brothers and sisters. In view of the voluntary partition had among the co-tenants, the question is not presented to us in an absolute and unqualified form, whether homestead rights can attach to an undivided interest in lands, in the absence of an express provision of the statute to that effect. In this connection, however, we do not hesitate to adopt the views of Mr. Freeman, who is known as a careful and judicious writer. "We see no sufficient reason," says he, "even in the absence of statutes directly bearing upon

the subject, for holding that a general homestead act does not apply to lands held in co-tenancy. The fact that a homestead claim might savor of such an assumption of an exclusive right as is inconsistent with the rights of the other co-tenant, and that the maintenance of such claim might interfere with proceedings for partition, form no very satisfactory reason for denying the exemption. If the rights of the other co-tenant are threatened or endangered, he alone should be permitted to call for protection and redress. The law will not sanction any use of the homestead in prejudice of his rights. . But as long as his interests are respected, or so nearly respected that he feels no inclination to complain, why should some person having no interest in the co-tenancy be allowed to avail himself of the law of co-tenancy for his own, and not for a co-tenant's gain? The homestead laws have an object perfectly well understood, and in the promotion of which courts may well employ the most liberal and humane rules of interpretation." Co-tenancy and Partition, § 54.

The co-tenants of Mrs. Myers have not been embarrassed or prejudiced by her homestead claim, and find no ground of complaint, as they entered into a mutual agreement for a voluntary partition of the property which they held in common, and set off and deeded to her, her interest in severalty. The partition, it is true, was accomplished without the knowledge of the plaintiff, and if there had been a statutory proceeding in partition, he would have been a proper party defendant as a person interested, and as such entitled to notice. But he has not been denied the right nor debarred the opportunity of inquiring and determining upon proper issues made, as to the justice of the partition. On the contrary, the circuit court decreed, that Mrs. Myers had become and was entitled to a homestead in the premises assigned to her in severalty, subject to the right of the plaintiff to make such inquiry.

Our attention has been called to *Gaylord v. Imhoff*, 26 Ohio St. 317, and it is virtually assumed in argument, that there is such an analogy between partnership and tenancy in common, that if the homestead exemption does not extend to partners, it can not extend to tenants in common. It was held

in that case, that the members of an insolvent firm are not entitled to the statutory exemptions out of the partnership property after it has been seized in execution by partnership creditors, notwithstanding all the members join in demanding the exemptions. But that case did not involve a consideration of the exemption of partnership lands, when claimed as homesteads. The incidents, moreover, annexed to partnership and tenancy in common are diverse and have a different origin, and it becomes evident upon examination, that even if a co-partner could not successfully claim as a homestead any part of the firm realty, an estate in common might support a right of homestead in one of the co-tenants.

Our conclusion therefore is, that the judgment of the circuit court should be affirmed, and the cause remanded for further proceedings.

*Judgment accordingly.*

OWEN, C. J., and SPEAR, J., dissent from first proposition of the syllabus, and from the judgment.

### KAHN, JR., v. WALTON ET AL.

*Contracts for the sale of personal property to be delivered at a future day—When valid—When illegal and void—When commission broker in such illegal sale a particeps criminis—Securities given for illegal considerations—Their infirmities—Parties to such illegal contracts—No standing in a court of equity—Their legal rights.*

1. Contracts for the sale of personal property to be delivered at a future day, if the parties intend the property shall be delivered and paid for, are valid, though the seller have not the goods, nor other means of getting them than to go into the market and buy them; but, when the real intention of the parties is merely to speculate on the rise and fall of prices, and the property is not to be delivered, but one party is to pay the other the difference between the contract price and the market price of the goods at the time specified for executing the contract, the transaction is against public policy, and void.
2. A commission broker, who with knowledge of its unlawful character, negotiates an illegal agreement between parties, becomes a *particeps criminis*, and cannot recover for services rendered, or losses incurred by

46s	198
46s	606
46s	198
49	250
46	198
51	280
46	198
58	441

---

Kahn, Jr., v. Walton *et al.*

---

him in behalf of either, in forwarding the unlawful undertaking; and checks, given him for such services or losses, are tainted with the vice of their origin, and subject to all the infirmities of securities given for illegal considerations.

3. A bank check, being an order on the bank by the drawer to pay his money as therein directed, is revocable by him before its presentation for payment, unless the bank on which it is drawn has accepted or certified it, or otherwise become committed to its payment; and while an affirmative answer by the bank, to a general inquiry whether checks of a person named for a specified sum are good, is information that such person has on deposit, subject to check, money to that amount, it does not constitute an acceptance or certification of, or otherwise create an obligation on the bank to pay, checks which the enquirer may then hold.
4. A plaintiff, who founds his cause of action on an illegal or immoral act, has no standing in a court of equity; and where both parties have been engaged in an unlawful transaction, the court will neither lend its active aid to the one party to get rid of the securities taken upon such transaction, nor assist the other party in retaining them, but will leave both to their strict legal rights.

(Decided January 8, 1889.)

**ERROR to the District Court of Greene County.**

On the 15th day of February, 1882, Moses A. Walton commenced his action in the Court of Common Pleas of Greene County, against the plaintiff in error Charles Kahn, Jr., and The Citizens' National Bank, of Xenia, to enjoin the bank from paying two checks, one for fifteen hundred dollars and the other for five hundred dollars, drawn by him upon the bank in favor of Kahn. The petition alleges: "that on the 14th day of February, A. D. 1882, the defendant Charles Kahn, Jr., by fraud and misrepresentation obtained from the plaintiff his two certain checks of that date for the sums of fifteen hundred dollars and five hundred dollars respectively, drawn by him upon the Citizens' National Bank of Xenia, a corporation duly incorporated under the laws of the United States; that said checks were given and are wholly without consideration, and the plaintiff received no value therefor whatever; that defendant, Kahn, is about to present the same for collection, and the bank is about to, and will, unless restrained by the order of the court, pay the checks, which will be an irreparable injury to the plaintiff, and for which he has

no adequate remedy at law ; that Kahn is not a resident of said county and has no property therein, and who is, as plaintiff is informed and believes, wholly insolvent." The petition prays "that the bank be restrained and enjoined from paying said checks, and that they may be ordered to be cancelled and delivered up to the plaintiff; and for all other and further relief to which in equity he may be entitled."

At the commencement of the action, the plaintiff obtained a temporary injunction as prayed for; and on the 6th day of March, amended his petition by adding to its averments the following: "That no consideration exists for said checks in said petition mentioned other than certain gaming contracts entered into by said plaintiff on or about the—— day of February, 1882, in the city of Cincinnati, Ohio, with the said Kahn, a broker and commission merchant of said city, for the purpose of speculating in the price of wheat, pork and lard, and which said contracts made by said Kahn, were in violation of the statute of gaming and against public policy, and were false and feigned, and by which he undertook in form to buy and sell wheat, pork and lard for and with this plaintiff without intending thereby either to receive or deliver said wheat, pork or lard, but solely to wager on the market price thereof, and to pay or receive the difference between the price in the contracts and the market rates at any time during the month of March, 1882, at the option of said Kahn, whichever the same would be; that said contracts were made as a cover for gambling in the prices of wheat, pork and lard; that no wheat, pork or lard was actually to be delivered or received, but the difference only in price was to be paid on the one side or received on the other at any time during the said month of March, at the option of said Kahn.

"That in pursuance of the said gaming contracts, and in addition to the execution and delivery of said checks, this plaintiff delivered and paid to said Kahn the sum of \$500; that no consideration for the payment of said sum of \$500 passed to the plaintiff other than that set forth aforesaid; that the said Kahn received to the plaintiff's use said sum of \$500 so lost and paid to said defendant, and said defendant,

---

Kahn, Jr., v. Walton *et al.*

---

Charles Kahn, Jr., is indebted to plaintiff in the said sum of \$500, with interest from the — day of February, 1882.

“Wherefore plaintiff prays, as in his original petition, and for judgment against said defendant, Kahn, for said sum of \$500, with interest from February —, 1882.”

The temporary injunction was, on motion of the defendant, Kahn, dissolved, and the plaintiff appealed to the district court, where, on the 28th of April, 1882, the plaintiff, by leave of that court, filed another amendment to his petition, adding the following averments: “That at the time of the execution and delivery of the said checks the plaintiff had on deposit with said bank, sufficient money to pay said checks; that prior to the presentation thereof, said Kahn, who is insolvent, by his agent, made inquiry of said other defendant as to whether said checks were good and would be paid on presentation; to which inquiry said bank made answer that said checks were good and would be paid, and said bank claims to have certified to said checks, and bound itself thereby to pay the same; that prior to the filing of the petition herein, and the allowance of said restraining order, this plaintiff requested and notified said Citizens’ National Bank not to pay said checks; but said bank refused said request, and threatened to and will, unless restrained, pay said checks.”

The defendant Kahn then answered, admitting “the corporate character of said bank; that said Kahn was about to present said checks for collection; his non-residence; that plaintiff had said money on deposit in said bank; said inquiries whether said checks would be honored and the response of said bank that they would; that said bank claims to have certified the same and bound itself to pay the same, and said notification to said bank not to pay the same, and the refusal of said bank. That a contract was made between said Kahn and plaintiff for the sale of property. That sales were made, and \$500 cash and said checks were paid thereon, but said Kahn denies each and every other allegation of said petition.”

The record shows, that at the April term, 1884, of the district court, the cause was by consent of the parties submitted to the court upon the pleadings and evidence, and the court

found the equities of the case in favor of the plaintiff and against said defendant Kahn, made the injunction perpetual, and adjudged the costs against Kahn.

A motion for a new trial, filed by Kahn, was overruled, and a bill of exceptions was duly taken, containing all the testimony given on the trial of the cause. It also appears in the bill of exceptions that at the close of the testimony the defendant Kahn requested the court to find the facts, and state its conclusions of law, and of fact separately; and also to find "the following conclusions of fact:

"*First*—Whether there was any agreement between the plaintiff and Charles Kahn, Jr., that the property purchased should not be delivered; but that simply the difference, if any, between the price at which the property was purchased and the price at which it should rule in March, 1882, should be paid.

"*Second*—Whether Charles Kahn, Jr., N. B. Ream & Co., or the persons of whom the property was purchased in January, 1882, intended that it should not be delivered, and that simply the difference, if any, between the price at which it should rule in March, 1882, and the price at which it was purchased should be paid, and who so intended.

"*Third*—Whether the court finds that simply the difference was to be paid, and no property delivered, from the circumstances of the transaction, and if so, what are the circumstances upon which said finding is predicated?

"*Fourth*—Whether the price of said property on the Chicago Board of Trade, in March, 1882, was more or less than the purchase-price in January, 1882; and if less, how much less.

"*Fifth*—Whether, by the terms of the contract between the plaintiff and Kahn, or by reason of notice to plaintiff, Kahn was justified in selling said property on March 1, 1882.

"*Sixth*—Whether the persons of whom the property was purchased in January, 1882, or their brokers, N. B. Ream & Co., had the property on hand ready to deliver on March 1, 1882, and whether they gave Kahn notice, and whether Kahn gave plaintiff notice, of their readiness to deliver the property, and that it would be sold March 1, 1882, if plaintiff would not take it.

---

Kahn, Jr., v. Walton *et al.*

---

*“ Seventh—*Upon whom the court finds the burden of proof rests to establish the character of the transaction, whether it was or was not a gambling transaction.

*“ Eighth—*Whether Charles Kahn, Jr., was simply a broker, agent and employe of plaintiff in causing the purchase and sale of said property on commission, without any interest in the profit or loss in the transaction.”

And it further appears from the bill of exceptions that the court in response to the foregoing request found as follows:

*“ Answer to requests 1 and 2.—*We find that the transactions in which the parties were engaged were mere speculations or ventures on the future prices of the products named in the pleadings, without any intention on the part of Walton, Kahn, or Ream & Co., that the property would be either paid for or delivered, but that the intention was that settlements between buyer and seller would be made on the differences between the market prices at the date named for delivery and the prices named in the contracts. That this was understood by all parties interested in the deals; that the same were gambling transactions and illegal.

*“ Answer to request 3.—*We find the foregoing facts from all the circumstances in the case and surrounding the transactions, and particularly from the fact that if *any* inquiry had been made it would have developed the fact that Walton was wholly unable to pay *one-fourth* the amount of the price of the property ostensibly purchased (being \$43,000), and that, in fact, said Walton was not worth over \$3,000 or \$4,000 at the time.

*“ Answer to requests 4 and 5.—*We find that in March, 1882, the price of property embraced in the deals mentioned had declined to an extent that absorbed the margins put up, and that, under the rules of the Board of Trade of Chicago, Kahn was justified in selling whatever interest Walton had in any property under his (Kahn's) control, but we have not regarded this as an important fact in the case.

*“ Answer to request 6.—*We find it probable that Ream & Co. had control of an amount of property equal in bulk and quality to that named in the several contracts, and could have



delivered it on demand March 1st, 1882, but we further find that in said deals they had no intention of so delivering it, nor had Kahn any intention of receiving it. Ream & Co. gave Kahn notice, and Kahn gave Walton notice, of their readiness to deliver the property, and that it would be sold March 1st, if plaintiff did not take it, but this was done after the commencement of this suit, and with knowledge that it would not be so taken by plaintiff.

“*Answer to request 7.*—Upon the plaintiff.

“*Answer to request 8.*—Kahn was, as between plaintiff and defendant, a broker-agent, interested only to the amount of his commissions.

“We further find that after the checks named in the pleadings were delivered to Kahn, a bank in Cincinnati telegraphed the Citizens' National Bank of Xenia, as follows: ‘Are M. A. Walton's checks for \$2,000 good?’ To which said Citizen's Bank sent an answer, as follows: ‘Yes, sir.’

“We find that this does not amount to ‘certifying’ the checks, and the Citizens' Bank did not thereby become bound to the holders of the checks for the amounts.

“We find that the contract was not executed by the giving of the checks, and that by enjoining the payment of the checks we simply stop carrying out a gambling contract, and thereby leave the parties where we find them.”

Judgment having been rendered against Kahn as before stated, he prosecutes error to this court to reverse the same, upon the grounds that the conclusions of law are not supported by the facts found, and the evidence does not sustain the finding of facts.

*Jordan & Jordans*, for plaintiff in error.

1. Contracts for the purchase of property, not in existence, for future delivery, are valid. Benj. on Sales, s. 78, 82, 241–2, 542; *Low v. Pew*, 108 Mass. 347.

2. Although the contract of purchase by Kahn—the broker agent for Walton—might be illegal, yet if Kahn, the agent, had no interest in it except his commissions, he may recover from Walton all damages he paid for him, for his breach of

---

Kahn, Jr., v. Walton *et al.*

---

contract, and his commissions, if he was guarantor for Walton. Wharton on Cont., sec. 453; *Norton v. Blinn*, 39 Ohio St. 145; *Roundtree v. Smith*, 108 U. S. 269; *Warren v. Hewitt*, 45 Ga. 501; *Williams v. Carr*, N. C. 299.

3. Unless both contracting parties intended that the property should not be delivered, but simply the difference paid, the contract is valid.

It takes two persons to gamble. If either party intended to deliver, he did not intend to gamble. One party may be a trifling, dishonest trickster, without any sense of honor or honesty, and may intend to cheat and repudiate his contract. The other may be an honorable, high-minded man of business, with large responsibilities, with ample ability to perform, and intending and expecting to perform his contract. He should not be denied the full benefit of his contract. Wharton on Cont. *supra*; *Gregory v. Wendell*, 39 Mich. 337; *Sawyer v. Taggart*, 14 W. P. D. Bush. (Ky.) 727; *Williams v. Tiedeman*, 6 Mo. Appeal, 269.

4. The burden of proof is on Walton to show that the contract of purchase is a wagering transaction as to both parties. Produce Exchange, p. 282, sec. 209; *Id.*, sec. 211; *Bigelow v. Benedict*, 70 N. Y. 202; *Story v. Salomon*, 71 N. Y. 420; *Williams v. Tiedeman*, *supra*.

5. The mere fact that Kahn was a broker and Walton was worth only \$3,000, and the purchase-price of the goods \$40,000, will not justify the conclusion of fact that only the difference in price was to have been paid and property not delivered, and especially unless Kahn knew of Walton's financial condition.

6. It was not the duty of Kahn, as broker agent of Walton, to inquire of Walton or any other person as to his financial condition, the presumption of law being that all men are *prima facie* solvent, and able to perform their contracts.

7. A court of equity will not interfere to enjoin the performance of a contract which is against public policy, but will leave the parties to their remedy at law. *Thomas v. Cronise*, 16 Ohio, 54; *Cooper v. Rowley*, 29 Ohio St. 547; *Roll v.*

---

Kahn, Jr., v. Walton *et al.*

---

*Raguet*, 4 Ohio, 400, 418; *Hoss v. Layton*, 3 Ohio St. 352; *Williams v. Englebrecht*, 37 Ohio St. 383; *Story's Eq. Jur.*, sec. 303, 308; *High. on Inj.*, sec. 1127; *Bispham's Eq.*, sec. 223.

*John Little*, for defendant in error—no brief filed.

WILLIAMS, J. The evidence tends to prove the facts found by the district court; and, as this court is not required to determine the weight of the evidence, the facts so found, will, in the disposition of the case, be regarded as established by the evidence. The case, shown by these facts, and those admitted by the pleadings, is, that Kahn who was a commission broker in Cincinnati, doing business with, and for Ream & Co., brokers and commission merchants in Chicago, bought of, or through them wheat and pork for future delivery, so called, on Walton's account. The transactions were mere speculations, or ventures on the prices of the commodities named, without any intention on the part of the parties concerned, that the property should either be delivered, or paid for; but all the parties understood, and intended that settlements should be made between them, on the differences between the market prices, at the dates fixed for delivery, and those named in the contracts. Kahn was to have a commission for his services, and he advanced margins on the deals. Walton was loser, and drew his two checks, amounting to two thousand dollars, on the bank where he had funds, payable to Kahn, for moneys paid by him on the deals and losses. Walton also paid Kahn five hundred dollars in money on the same account. Kahn telegraphed to the bank, inquiring if Walton's checks for the amount of those drawn to him were good, and received an affirmative answer.

Walton notified the bank not to pay the checks, and before their presentation, brought his action to enjoin their payment.

I. Upon this state of case, the first inquiry naturally is, were the speculative transactions in which the parties engaged, in the nature of wagers, and for that reason illegal? In the determination of this question it is not deemed material

whether they fall within the provisions of our statutes against gaming and wagering, or do not; for, it is generally held in this country, that wagering contracts, though not prohibited by statute, are illegal, and void as against public policy. And the great weight of authority is to the effect, that contracts of the kind the district court found those involved in this case to be, are void as wagering agreements. This has been held by the courts of last resort in every state where the question has been presented, and by the Supreme Court of the United States. The rule generally accepted is, that contracts for the sale of personal property to be delivered in the future are valid, if the parties really intend and agree that the property is to be delivered by the seller, and the price is to be paid by the purchaser, though the seller have not the goods, nor any other means of getting them, than to go into the market and buy them. But if the real intent be merely to speculate on the rise and fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the contract partakes of the nature of a wager and is void. *Irwin v. Williar*, 110 U. S. 499; *Higgins v. Moore*, 116 U. S. 671; *Man v. Bishop*, 136 Mass. 495; *Gregory v. Wendel*, 40 Mich. 432; *Cole v. Milmine*, 88 Ill. 349; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Lowry v. Dillman*, 59 Wis. 197.

II. The facts found by the district court, plainly define Kahn's relation to the unlawful agreements. He was directly connected with them; and with full knowledge of their character, performed services and expended money to promote and forward them. It was his intention, as well as the intention of the other parties, that the property should not be delivered, or paid for, but that the differences in the prices should be adjusted in money. It is true, Kahn was the broker, and had no pecuniary interest in the business except his commissions, and the repayment of whatever sums he might advance for margins and to pay losses as the business progressed. He

nevertheless, negotiated the wagering contracts and was party to them.

The legal effect of such relation to contracts of that nature, was determined in the case of *Irwin v. Williar, supra*. The conclusion of the court is thus stated: "In *Roundtree v. Smith*, 108 U. S. 269, it was said that brokers who had negotiated such contracts, suing not on the contracts themselves, but for services performed and money advanced for defendant at his request, though they might under some circumstances be so connected with the immorality of the contract as to be affected by it, they are not in the same position as a party sued for the enforcement of the original agreement. It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it which renders it void, and in such a case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and can not recover for services rendered or losses incurred by himself in behalf of either in forwarding the transaction." We accept this as a sound and wholesome rule, and under its operation, the checks, given by Walton to Kahn, for services rendered and losses paid by him in the unlawful enterprise, are tainted with the vice of their origin, and are subject to all the infirmities of securities given for illegal considerations.

III. It is contended, that the drawing of the checks by Walton on the bank where he had sufficient funds to pay them, and the bank's response to the inquiry of Kahn's agent, that checks to their amount were good, was a specific appropriation of the fund, and amounted to payment of the debt for which they were drawn; whereby the contract became fully executed.

A check, being simply a written order of a depositor to his banker to make a certain payment out of his funds, is executory, and, of course, revocable at any time before the bank has paid it, or committed itself to its payment. It operates, it is

---

Kahn, Jr., v. Walton *et al.*

---

true, as an assignment of the fund on which it is drawn *pro tanto*, and binds the bank to its payment out of the fund when presented, unless revoked; but, it is not itself payment of the debt for which it is drawn, unless it be so agreed between the parties. Ordinarily it is only a means of payment, and the debt is not extinguished, unless and until the check be paid, or the holder be guilty of laches which may operate as a discharge of the drawer. The bank is the agent of the drawer. Its duty is to pay his money as he directs. It owes no duty to the holder, except under the drawer's directions, until by virtue of those directions it assumes some obligation to the holder. Up to that time the latest order from the drawer governs. But after the bank has paid the check, or placed itself under an obligation to pay it, the drawer's power of revocation is ended. This obligation may be incurred by acceptance. It is sometimes said that the legal effect of the acceptance is to place the holder of the check in the position of a depositor. By the acceptance a new and specific engagement is entered into by the bank, which is, to unconditionally pay the sum named to the legal holder of the check. The acceptance or certification is sometimes evidenced by writing the word "good" on the check by the authorized officer or agent of the bank; but no particular mode or form is necessary, and it is generally held that a verbal acceptance is sufficient. But whatever the mode or form employed, there must be enough to indicate the acceptance of the particular check.

It is manifest there was no acceptance, or certification of the checks in question in this case. The telegraphic correspondence between the bank and Kahn's agent amounted to no more than an assurance that valid checks to the amount stated, drawn by Walton, or that might be drawn by him, were then good. No particular checks were mentioned in the inquiry, nor any intimation given that the enquirer had received, or was about to receive such checks; nor had the bank any means of identifying the checks to which the inquiry related. Its telegram, therefore, did not commit the bank to the payment of any particular check. At most, it was information that Walton had, at its date, money on deposit to the amount stated, subject to

check. *Espy v. Bank*, 18 Wall. 604. If, therefore, before the checks were presented for payment, and before they were certified or accepted by the bank, or it otherwise became committed to their payment, Walton revoked them, and notified the bank not to pay them, as he claims, and as the district court found he did, his defensive remedy at law would appear to be adequate.

IV. But what standing has the plaintiff in a court of equity? The transactions upon which he founds his claim for relief were unlawful; and the remedy he seeks, is protection against the consequences of his own participation in them. In such cases, equity keeps its hands off, and leaves the parties where it finds them. It is a fundamental rule of equity, that parties wanting its aid, must come with clean hands. Courts of equity require honesty, good faith and legality in transactions between men; and if a party would pursue his remedy therein, his demand must not rest on a violation of law for its foundation, or arise from his own illegal acts, or conduct *contra bonos mores*. 1 Waite's Actions and Def. 153; 3 *Ibid.* 685. It was said by Lord Mansfield in *Holman v. Johnson*, Cowp. 341, that "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says, he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for when both are equally in fault, *potior est conditio defendentis*." In *Atwood v. Fisk*, 101 Mass. 363, which was a bill in equity to compel the surrender and cancellation of a note, and mortgage given to secure its payment, on the ground that the consideration for them was illegal, the court in denying the relief sought by the bill, declares it to have long been settled, "that the law will not aid either party to an illegal contract to enforce it against the other, neither will

it relieve a party to such a contract who has actually fulfilled it, and who seeks to reclaim his money or whatever article of property he may have applied to such a purpose. The meaning of the familiar maxim, *in pari delicto potior est conditio defendentis*, is simply that the law leaves the parties exactly where they stand; not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action, founded on the illegal contract, in favor of either party against the other. They must settle their own questions in such cases without the aid of the courts."

The statement of the rule by Chancellor Walworth in *Harrington v. Bigelow*, 11 Paige 349, may be applied directly to this case. He says: "where both parties have been engaged in an illegal transaction, the court will not lend its active aid to the one party to get rid of the securities taken upon the illegal transaction, nor will it aid the other party in retaining them; but will leave both to their strict technical rights."

In *Weakley v. Watkins*, 7 Humph. 356, it is held that "a court of chancery will not entertain a bill to cancel an obligation, the consideration of which is a violation of chastity, the compounding of a felony, smuggling, gaming, false swearing, or the commission of any crime, or a breach of good morals." This was a bill in chancery filed by Weakley against Watkins and Ferguson, to obtain the cancellation of a note under seal executed upon a gaming consideration. A demurrer was filed to the bill, and the court in the opinion says: "It is true that a court of chancery, upon the principle of *quia timet*, will order said instruments to be delivered up and cancelled. But this is when the complainant has been imposed upon, and executed an instrument void, for fraud, accident, mistake or other cause, which renders it iniquitous and unjust that it should be enforced against him, and when in the execution of it, he has himself been guilty of no violation of law or good morals. But this principle has never been held applicable to instruments knowingly executed in violation of good morals, or express prohibition either by common or statute law. For instance, no court of chancery will entertain a bill to cancel an obligation, the consideration of which was a violation of



chastity, compounding a felony, the smuggling of goods in violation of the revenue laws, gaming, false swearing, etc.; and this for very obvious reasons. The complainant shall not be permitted to charge himself with crime, and obtain relief out of it; and because public policy requires that the execution of all such contracts shall be discouraged; which can not be more effectually done, than by repelling all actions upon them in courts of justice. In contracts of the kind now under consideration, we have held that they are inoperative and void, as contrary to good morals and positive enactment, and that as such, they are not fit subjects for the action of a court; it is true that in all the cases we have heretofore had, the attempt has been to enforce them; but we can see no difference in the position of the winner and loser, so far as to their right in becoming active movers upon such contracts in the courts; the one seeking to enforce them by the judgment of a court of law, the other, seeking by the aid of a court of chancery to have them delivered up and cancelled; they are equally repelled upon reason and authority."

It was said by this court in *Roll v. Raguet*, 4 Ohio, 400, that "whenever the agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties as it finds them; if the agreement be executed, the court will not rescind it; if executory, the court will not aid in its execution." This was again held in *Raguet v. Roll*, 7 Ohio, pt. 1, p. 77. And see *Raguet v. Roll*, 7 Ohio, pt. 2, p. 70. The doctrine of these cases has recently been approved and enforced by this court. *McQuade v. Rosecrans*, 36 Ohio St. 442; *Williams v. Englebrecht*, 37 Ohio St. 383.

And in *Thomas v. Cronise*, 16 Ohio, 54, it is laid down as "a universal principle, both in law and equity, that where an agreement is founded upon a consideration illegal, immoral, or against public policy, a court will leave the parties where it finds them."

In *Hooker v. DePalos*, 28 Ohio St. 251, the same doctrine is announced in the following language: "The maxim '*ex turpi causa, non oritur actio*,' is an old and familiar one, rest-  
VOL. 46—14

ing on the clearest principles of public policy, and never to be ignored. In accordance with this maxim, nothing is better settled than that, in regard to contracts which are entered into for fraudulent or illegal purposes, the law will aid neither party to enforce them whilst they remain *executory*, either in whole or in part, nor, when *executed*, will it aid either party to place himself *in statu quo* by a rescission, but will, in both cases, leave the parties where it finds them. It is true that particular statutes have been, from time to time, enacted in this state as well as in many of our sister states, which are, to some extent, in contravention of this common law doctrine. The statutes of this state, which allow money won by gaming or betting to be recovered back by the loser, furnish an example of this kind. But such statutes are a recognition of the established rule that no recovery could be had in such cases at common law; they are exceptional in their character; are in derogation of the common law; and therefore are to be construed strictly, and not extended by implication beyond the particular cases of illegality for which they provide." The statutes adverted to, change the common law so far as to give the loser the right to recover back what he has lost, and provide a remedy therefor, but no farther. In all other respects the common law governs. Whether these statutes have any proper application to contracts like those under discussion, need not now be decided; for if it be granted that they have, yet, since they make no provision for equitable actions for injunctions, the right to such remedy must be determined by considerations independent of the statutory regulations. *Veach v. Elliott*, 1 Ohio St. 139; *Thomas v. Cronise*, *supra*.

The legislature, apparently recognizing the inapplicability of the statutes theretofore in force to such contracts and transactions, enacted that of May 4, 1885 (82 Ohio L. 254), which declares all contracts for the sale of grain, provisions and other specified articles, when there is no intention to deliver, or pay for, the articles sold, to be void; and makes them gambling and criminal acts. This statute having been passed after the contracts between these parties were made, of course cannot affect the decision of the case. And if it were otherwise, they

do not confer upon the plaintiff the right to maintain the action prosecuted by him.

Precisely what effect has been given the English statutes, in the decisions of the courts of that country upon this subject, is not very clear; it is nevertheless true that parties to gaming securities, were there expressly authorized by statute, to go into chancery for discovery, which gave ground for the application of the familiar rule, that a court of chancery having jurisdiction for one purpose, will retain the case for final relief. In the case of *Rawden v. Shadwell*, 1 Ambler, 268, which was a bill for discovery, and the cancellation of a bond given for money won at gaming, the report states that Lord Hardwicke decreed with great clearness, and said, by Stat. 9, Anne, "all securities for money won at play, are made void, consequently the payment, under any security, can not be supported;" and *Baker v. Williams* is referred to in the report as an authority for the decree. In the note to the case it is said that the Statute of 9 Anne gives leave to come into a court of chancery for a discovery; and Sir J. Jeckyll, Master of the Rolls, in the note citing *Baker v. Williams*, said: "and if it (the note) was put in suit at law, no doubt but the party might make a defense against it under the act; but that is no objection against coming into this court (chancery), for as the person giving the note is entitled to a discovery here, it could not be the intention of the legislature, that after the discovery, he should be sent to another court for relief; so it is, that upon a discovery of assets, the court grants relief, without sending the party to law." And it may be noticed that in *Woodson v. Barrett*, 2 Hen. & Munf. 88, the Supreme Court of Virginia followed *Rawden v. Shadwell*, under a statute which was an exact copy of 9 Anne, except that the word "contract" was inserted in it, which was omitted in the Statute of Anne. And the case is followed by the same court in *Skipwith v. Strother*, 3 Rand. 216.

In this respect the Statute of Anne differs essentially from ours. The only actions provided for by our statute are the purely legal ones, to recover back the money lost, and for the conversion of the goods won of the plaintiff. No suit in

---

Kahn, Jr., v. Walton *et al.*

---

equity is authorized or contemplated. The provision of the statute that the plaintiff may annex to his petition in the legal actions it permits, interrogatories for discovery, at once removes the necessity and cause for recourse to equity; and the statute which created the right, having specially prescribed the legal remedies mentioned, and none other, they must be deemed exclusive.

It can not be denied, however, that courts have differed in the application of these kindred maxims, "*ex turpi causa non oritur actio*," and "*in pari delicto portior est conditio defendentis*"; especially to gaming securities, which, it has been held by some courts, are so far excepted from the operation of the maxims that equity will decree them to be surrendered and cancelled. The reasons given for so holding are that "the circulation of gaming bonds, is no less to be discountenanced than the giving of them, and no means are more likely to prevent the giving of them, than to put an effectual stop to their circulation;" and, that because the losers are permitted to defend against securities given by them, on the ground that they were given for a gaming consideration, courts of equity should entertain suits for their cancellation.

These appear to be arguments, not so much in favor of the asserted exception, as against the maxims themselves; for it is apparent that the same reasoning, would in the same measure, exclude from their operation every contract and security founded upon any other illegal consideration. The circulation of all bonds and securities given for any illegal or immoral consideration, is quite as much to be discountenanced as the giving of them; gaming bonds and securities, no more than others; and, if putting a stop to the circulation of gaming bonds, by a resort to a court of equity to compel their surrender and cancellation, be the most effective means of preventing the giving of them, then the same means should be permitted and adopted, and for the same reason, to accomplish the same end, with regard to bonds and securities given for any other illegal consideration. And, if, because parties may defend against securities given by them, on the ground that they were given for a gaming consideration, is a valid reason why a court

of equity should entertain a suit for the cancellation of such securities, it is an equally valid reason why that court should entertain suits for the cancellation of instruments founded upon any other illegal consideration; for such consideration may also be made a ground of defense to them. Such is the logical result of the argument in favor of the exception contended for. And some English cases have gone to that extent. In *Neville v. Wilkinson*, 1 Bro. Ch. R. 547, Lord Chancellor Thurlow is reported to have said, "that in all cases where money was paid for an unlawful purpose, the party, though *particeps criminis*, might recover at law; and that the reason was, that if courts of justice mean to prevent the perpetration of crimes, it must be by not allowing a man who has got possession to remain in possession, but by putting the parties back to the state in which they were before." But Mr. Justice Story, referring to the words of the Lord Chancellor, says: "this is pushing the doctrine to an extravagant extent, and effectually subverting the maxim, '*In pari delicto potior est conditio defendentis.*'" The ground of reasoning upon which his lordship proceeded is exceedingly questionable in itself; and the suppression of illegal contracts is far more likely in general to be accomplished, by leaving the parties without remedy against each other, and by thus introducing a preventive check naturally connected with a want of confidence, and a sole reliance upon personal honor. And so accordingly the modern doctrine is established." 1 Story's Eq. Jur. sec. 298. The difference between the earlier cases, and the current authorities on the subject, is pointed out in the following note to this section: "I say, *at present*; for there has been considerable fluctuation of opinion, both in courts of law and equity, on this subject. The old cases often gave relief both at law and in equity, where the party would otherwise derive an advantage from his iniquity. But the modern doctrine has adopted a more severely just and probably politic moral rule, which is, to leave the parties where it finds them, giving no relief and no countenance to claims of this sort." Mr. Bispham, in his "Principles of Equity," sec. 223, says: "The rule, both at law and in equity, in regard to gambling transactions, *now* seems to be that the courts will not only

refuse to lend their aid for the purpose of enforcing such contracts, but they will not assist the losing party in setting the contracts aside or recovering back the money paid. The maxim applicable to such cases is "*potior est conditio possidentis.*" The opinion of the Supreme Court of Massachusetts, in the case of *Atwood v. Fisk*, before cited, is to the same effect. It is there stated as the prevailing doctrine, that "the suppression of illegal contracts is far more likely in general to be accomplished by leaving the parties without remedy against each other. And so the modern doctrine is established that relief is not granted where both parties are *in pari delicto.*"

A review of all the authorities would occupy much space, and be of little practical value.

The test for determining when the objection that the parties are *in pari delicto* can be sustained, is whether the plaintiff can make out his case otherwise than through the medium, and by the aid of the illegal transaction to which he was himself a party; and when applied to this case, is conclusive against the plaintiff. He asserts that he knowingly entered into an unlawful engagement; one contrary to good morals and against public policy. He entered into it with knowledge that either he, or the other party must lose, and with the intention of reaping the fruits of his unlawful venture if he should prove to be the winner. His expectations were disappointed. He lost, paid part of the loss, and for the purpose of making further payment drew his checks on a bank in which he had sufficient funds on deposit to pay them. These checks he delivered to the winner, or his agent, and having gone thus far, he appeals to a court of equity to interfere in his behalf, and interpose its extraordinary aid by injunction to stop their payment. After he lost, he might have refused further to act, and still be safe; and if by giving the checks the other party has acquired an advantage over him, it results from his voluntary act in the execution of his illegal enterprise. We fail to perceive how, to relieve parties in cases like this, from the consequences in which their own wrongful conduct has involved them, would tend to discourage such adventures, promote good morals, increase re-

spect for the law, or accord with a sound public policy. In reaching this conclusion, we have not overlooked the rule that a party, who advances money upon an undertaking or agreement to do an act that is illegal, immoral or against public policy, may, at any time before the wrongful act is done, and while the agreement or undertaking remains wholly unexecuted, repent and retract. He may wholly rescind the contract, prevent the act from being done, and recover back. The law encourages such repentance and abandonment of the unlawful undertaking, and will aid the party, because it tends to prevent wrongdoing. But to be efficacious, the repentance must be timely; and it comes too late after the unlawful act has been done and the undertaking in whole or in part performed. Then the law will assist neither party in its further execution, nor to undo what has been done in its execution. *Hooker v. DePulos supra.*

*Judgment reversed and petition dismissed.*

MINSHALL, J. (dissenting.)

I regret that I am unable to agree with my bretheren in the decision of this case. The finding of facts shows that the checks in question had their origin in a gaming transaction; and the only question on which we differ is, whether the plaintiff being as is said *in pari delicto*, can in equity ask to have them delivered up and cancelled. The transaction between the parties was in substance a bet, or series of bets, on the price of wheat, pork and lard at a future time, but, taking the form of fictitious sales for future delivery, was not only reprehensible as a gambling transaction, but was also detrimental to the public by creating a fictitious demand for these products, and thus disturbing the normal condition of the markets. It is not necessary that we should to any extent point out the evils connected with what is called dealing in "margins," the twin evil of "stock-jobbing," characterized by Sir John Barnard's Act, as "infamous." (7 Geo. 2, s. 8.) They are illustrated in the history of our markets by numerous instances, entailing not only bankruptcy and ruin upon many of the parties directly concerned,

---

Kahn, Jr., v. Walton *et al.*

---

but also, wide-spread distress among all classes of community, whether producers or consumers. There is no effort of the mind by which such a transaction can be made to appear any thing else than a wager, when reduced to the plain understanding of the parties, as adopted and acted on by themselves. The seller does not intend to deliver the thing sold, nor the buyer to receive it; the agreement is that the purchaser shall pay or receive the difference according as the price of the thing, ostensibly dealt in, goes up or down by the day. As said by Judge Barr, in *Bryant v. W. U. T. Co.*, 22 Am. L. Reg. 613: "This business is simply gambling—gambling of the same sort as 'three card monte' or 'faro.' It is more pernicious and demoralizing than either, for men and women will go upon a 'stock-exchange,' a 'board of trade' or into a 'bucket-shop' and put up their 'margins' or bets upon the rise or fall of stocks or grain that would never enter a 'gambling hell' to bet upon the turn of a card." The so-called settlement takes place upon the determination of the event; one pays what the other receives, and this is so in every wager, with this difference in language only, that the one loses what the other wins. But courts do not, in a matter of this kind, deal in mere differences of language; the consequences to the public will be the same whether the act of parting with the money is termed the payment of a debt or the losing of a wager. See the opinion of Justice Matthews in *Irwin v. Williar*, 110 U. S. 499. It has been well observed that, "If a contract be a wager in substance, no matter how the end is brought about, it would be void, though the object were ever so cunningly concealed in the form given to the transaction." Max. Int. Stat. (2nd ed.) 135.

But there is no material difference in the court as to this. The majority hold that the general doctrine, that where parties are equally guilty, a court of equity will not lend its aid to either, but leave them where it finds them, applies. This as a general rule is true, and is both wise and expedient. But it is not universal. It has many exceptions, of which gaming transactions is one. Courts do not ordinarily, independent of statute, aid a party in recovering what he has lost at gaming;



but, so long as the matter remains executory, courts of law and equity will lend their assistance to the defeated party, not by reason of any merit in him, but to promote the public interests by enforcing a sound rule of public policy. Thus in a court of law the loser is permitted to defend in a suit upon a security given by him, on the ground that it was given for a gaming consideration; and, in analogy to this, courts of equity have uniformly entertained suits to require such securities to be given up and cancelled, where the party may be deprived of his defense in a court of law by the negotiation of the security. This seems to be the unquestioned doctrine in a court of equity, and has been applied from an early time. Thus it is said by Mr. Ballow, the supposed author of the text of Fonblanque's Equity, "although equity will not usually interfere in cases relating to the gaming acts, because it considers both winner and loser equally guilty, and, in taking upon them to game they seem to renounce the benefit of the law; yet, even at law, in an action upon a wager, they have given the defendant leave to *imparl* from time to time; though in strictness, it is not prohibited by the common law. Much more ought equity to discourage it, because the public is concerned that men should not mis-spend their estates and time. And in the civil law, they allow the loser to recover his money, even beyond the ordinary time of prescription." And, in a note, Fonblanque observes that, "prior to the time of 16 Car. II, equity often interfered for the purpose of restraining the winner from proceeding at law against the loser, upon the security he had obtained for the money won,"—citing a number of cases. Fonbl. Eq. B. 1, ch. 4, § 6, and n. c. The cases cited fully sustain what is said. The same doctrine is stated by Mr. Adams. "So long," he says, "as the contract continues executory, the maxim of *in pari delicto* does not apply; for the nature of the contract would be a defense at law, and the decree of cancellation is only an equitable mode of rendering the defense effectual." Adams' Eq. m. p. 175. This doctrine is also supported by the authority of Judge Story and the cases which he cites. He says, "In regard to gaming contracts it would follow, *a fortiori*, that courts of

---

Kahn, Jr., v. Walton *et al.*

---

equity ought not to interfere in their favor, but ought to afford aid to suppress them, since they are not only prohibited by statute, but may justly be pronounced to be immoral, as the practice tends to idleness, dissipation, and the ruin of families. No one has doubted that under such circumstances a bill in equity might be maintained to have any gaming security delivered up and cancelled." Story's Eq. Juris. § 303. He cites the following cases: *Rawden v. Shadwell*, 5 Ambler R. 269 and Mr. Blunt's notes; *Woodroffe v. Farnham*, 2 Vern. 291; *Wynne v. Callender*, 1 Russ. R. 23; *Baker v. Williams*, cited in Blunt's notes to Ambler R. 269; *Portarlington v. Soulby*, 3 Mylne and Keen, 104. I have taken the pains to examine each of these cases, and find that, in each, relief was given a loser by the cancellation of the security he had given for the money lost. Also, Prof. Pomeroy maintains the existence of the jurisdiction in equity to grant such relief, with no little earnestness and zeal. After stating the rule as to executed transactions of the kind, he says, "finally, as long as the contract is still executory, equity has jurisdiction to aid the losing party by ordering the written agreement and other securities to be surrendered up and cancelled, and by granting the ancillary remedy of injunction to restrain their negotiation, transfer or enforcement; and when the circumstances are such that the defensive remedy at law would not be equally certain, complete and adequate, this jurisdiction ought to be and will be exercised." He then adds, "this conclusion is sustained by the highest authority, and is in perfect accord with principle." Pom. Eq. Juris. § 938 and n 1. It is difficult for the mind to make a distinction in principle between a court entertaining the defense that the consideration of a security, in an action upon it by the holder, is immoral, and, for a like reason, entertaining a suit to have it delivered up and cancelled; or to give a reason why if it may entertain the plea, it should not, likewise, entertain the suit. In either case it must listen to the averments of a party who apparently pleads his own turpitude. And so Mr. Pomeroy properly insists that the remedy of cancellation or injunction "is simply the equitable proceeding identical with the setting up the ille-

gality as a defense to defeat a recovery at law, and thus to get rid of the contract as a binding executory obligation." Eq. Juris. § 940; and, in this, he is sustained by the authority of Mr. Adams, as will be seen by the quotation before made.

All bets or wagers are not equally reprehensible in morals or opposed to public policy. This, as at common law, depends upon the character of the event upon which the wager is laid. In many instances the occurrence of the event will not, in and of itself, be a matter of any public consequence. A wager laid upon such an event, whilst it may influence the occurrence, is not likely to be of detriment to any one beyond its effect upon public and private morals. This is not so, however, in all cases. A bet on the price of wheat at a future time, when it assumes the form of a fictitious sale of a number of bushels from one to another, necessarily influences prices by creating a fictitious demand for wheat; and, affecting as it does the material as well as moral interest of a people, its discouragement is demanded by every consideration of public policy, that can well influence the judgment of a court to take jurisdiction and grant relief. 2 Pom. Eq. Juris. § 941.

There is much practical wisdom in what is said by Tucker, J., in *Woodson v. Barrett*, 2 Hen. & Munf. 88, that "the circulation of gaming bonds is an evil no less to be discountenanced than the giving of them. And no means are more likely to prevent the giving of them than to put an effectual stop to their circulation." This is approved in *Skipwith v. Strother*, 3 Rand. 216, as a remark of "great strength and propriety." In each of these cases the court cancelled a judgment that had been rendered upon a gaming security, after the defendant in each had had an opportunity to defend, and made default; and in the former, also, granted relief in favor of the sheriff, who had been sued for damages by reason of an error in executing an *elegit* issued upon the judgment, "on the ground of the turpitude of the original transaction." These cases involve the whole question, and leave nothing for discussion. Pom. Eq. Juris. n. 1, § 938.

None of the Ohio cases, when rightly considered, militate against the doctrine. The case of *Cowles v. Raguet*, 14 Ohio,

38, and the cases from which it arose in the course of a protracted litigation, present a somewhat curious application of the principle that, in granting relief against agreements based on immoral considerations, distinguishes between an executory and an executed contract. A note secured by a mortgage had been given for compounding a felony. In a suit upon the note the illegality of the consideration was admitted as a defense, on the ground that the contract was executory. *Raguet v. Roll*, 4 Ohio, 400. Afterwards, a like plea was admitted, and for a like reason, in a *scire facias* upon the mortgage to enforce payment. 7 Ohio, pt. 1, 76. But in an action of ejectment on the mortgage, subsequently brought, *Roll*, the mortgagor, set up the same defense as in the former case, but it was not allowed, the court holding that a mortgage is an executed and not an executory contract. 7 Ohio, pt. 2, 70. Note the somewhat obsolete grounds upon which the reasoning is placed by Grimke, J., in delivering the opinion at pp. 72-73. "Although," he says, "a strong disposition existed once to treat a mortgage as a mere chose in action, and although individual judges were heard to declare that the money was the principal, and the land only the incident, \* \* \* yet such is not now supposed to be the law. A mortgage is in reality a conditional fee, which is as large an estate as a fee-simple, though it may not be so durable." We suppose the law, as here stated, is not now the law anywhere; and yet it constitutes the *rationale* of that decision. Finally, in the case of *Cowles v. Raguet*, it was held, after much debate, that, notwithstanding the consideration of the note for which the mortgage was given as a security was illegal, and after the land had been recovered in ejectment upon the mortgage, the mortgagor had the right to redeem. We have but two remarks to make upon these cases by way of distinction: (1) The note was not based upon a wagering consideration, and so not within the exception taken by courts of equity upon matters of this kind; and (2) the distinction between an executed and an executory contract was recognized and intended to be applied in each of them, and whether rightly applied in the ejectment suit, or not, cannot affect its application in this case, since there is no

question here but that the contract remains executory—a check has been given but the money has not been paid. The case of *Thomas v. Cronise*, 16 Ohio, 51, was a suit by the relator to have a deed that he had executed and delivered for a lot he had bet and lost upon the gubernatorial election of 1842, to be declared void. From the statement of the court it appears that the winner was in possession under the deed. The relief was denied for the reason, as held, that the contract had been executed. Any statements of the judge in delivering the opinion outside of the case so made, were merely *obiter*. In *Hooker v. De Palos*, 28 Ohio St. 251, the action below was a suit by De Palos to recover of Hooker \$500 paid on a contract by which H. had agreed to sell the plaintiff a certain farm to be put up as a prize in a lottery, for which he was to be paid part in money and part in tickets in the lottery, and the money sought to be recovered had been paid on this contract. The court treated the transaction “as fully executed,” and denied relief. Of this case we may make the same observations, that apply to *Cowles v. Raguet*—it was not a wagering contract, and had been executed. We submit that none of these cases conflict with the well recognized doctrine that a court of equity may, and upon principles of public policy should, when appealed to, order the delivering up and cancellation of negotiable securities that have been given for a gaming consideration. In all of them where relief was denied, the defendant was within the correct interpretation of the maxim *in pari delicto potior est conditio possidentis*, the maxim applicable to such cases, and not that which refers generally to the condition of the defendant, as pointed out by Professor Pomeroy: “If the contract is still executory, the promisor is left undisturbed in the possession of the money or other property which he agreed to pay or transfer; if the contract has been executed, the promisee is left undisturbed in the possession of money or other property which has been paid or conveyed to him. This is the true meaning of the maxim, and it involves no requirement that the contract, as a mere executory instrument, should remain unmolested; it deals

solely with the rights flowing, or which would flow from the agreement." Pom. Eq. Juris. § 939.

The fact that the Statute 9 Anne, c. 14, provided for a discovery in aid of an action to recover back money lost at gaming, was not the ground on which courts of equity granted relief against gaming securities. The jurisdiction had been exercised, long prior to that statute. Fonb. Eq. note *c, supra*. Moreover, our statute not only declares all securities given for wagering considerations void, as did the Statute of Anne, but goes farther, and declares all wagering *contracts* to be void, § 4269, Revised Statutes; and, like the Statute of Anne, gives an action to the loser for a recovery of the money lost § 4270; and such has been the law since 1831, S. & C. 664.

It is true that Bispham seems to treat a gaming security, so far as relief in equity is concerned, as in the same category with all other securities based upon an illegal consideration. He cites no cases nor authorities, and it is more than likely that the doctrine as to such securities had escaped his attention. If, however, he is to be understood as stating what is claimed from his text, he is unsupported by any other writer on equity jurisdiction, that I have been able to consult. In addition to the citations heretofore made, I cite Snell's Eq. 518; and Willard's Eq. Juris. 225. The former observes that the jurisdiction is based on the ground that it is "better to prevent than relieve," and the latter asserts that "there is no doubt" about its existence. After a diligent search, I have been able to find but one case, *Weakly v. Watkins*, 7 Humph. (Tenn.) 356, decided in 1846, in which a contrary doctrine has been directly held. In a suit to enjoin a judgment that had been rendered *pro confesso* on a sealed bill on the ground that it had been given for a wagering consideration, the chancellor had decreed for the plaintiff. The decree was reversed by the Supreme Court, the judge delivering the opinion saying that he "could see no difference in the position of the winner or loser so far as (relates) to their rights in becoming active movers upon such contracts in the courts." The court differed with the chancellor, who was doubtless more conversant with the doctrine of equity on the subject

than the judge who delivered the opinion of the court. He failed to perceive that the action by the loser is simply subservient to a wise public policy, and not on the contract at all.

The learned judge, in the cases he has cited in support of the opinion of the majority, seems to overlook or does not regard, the difference between an executed and an executory contract; and that gaming securities have, for reasons before stated, been singled out by courts of equity as proper subjects for relief by cancellation or injunction, although the parties may be *in pari delicto*.

I think the judgment should be affirmed.

SPEAR, J. The principle of most consequence in the case seems to be one of public policy. Which will best conserve the public interest, to allow relief to one in the circumstances which surround the defendant in error, Walton, or to refuse it? When a court, in disposing of a case, has declared a correct principle of law, and correctly applied it, a like application should be made in a subsequent case involving a like principle. In *Barholt v. Wright*, 45 Ohio St. 177, where a party provoked a quarrel, made the first assault, and then got worsted in the combat, the court held that the assailant had a right of recovery for damages accruing from the excess of resistance used by his opponent. If a party thus circumstanced may have a standing in court to have his self-invited wrongs righted, in an action at law, by a verdict and judgment which will inflict pecuniary loss on the other party, (and the authorities seem to warrant the holding), it is not easy to see why one who has engaged in a gambling contract, though it be an unlawful transaction, may not have a standing in a court of equity, and ask that court to extend its aid in preventing his more lucky accomplice from enjoying the usufruct of his ill-gotten gains; and if breaches of the peace are more discouraged by giving the defeated party, though the aggressor, and a violator of the criminal law, a right of action and the opportunity to use the courts of the state to enforce it in the former case, than by refusing it, it would seem that a like policy would be subserved by giving

---

Bridge Co. v. Savings Bank.

---

the unlucky loser the aid of equity, in the latter. The maxim that one asking aid of a court of equity must come with clean hands, is not forgotten, but, along with it is another maxim, that a court of equity will follow the analogies of the law. And the court, having fixed the rule of law in the case referred to, ought not, it is respectfully submitted, to hesitate to apply the rule to the case at bar. Following the principle of that case, I think the judgment of the district court should have been affirmed.

---

BRIDGE CO. v. SAVINGS BANK.

*Collateral security made payable at a particular bank—Duty of pledgee.*

1. Where a note is indorsed and delivered as collateral security, the indorser and indorsee are to be regarded as sustaining towards each other the relation of pledgor and pledgee; and if such collateral paper matures before the principal debt, the duty and obligation of the pledgee in the collection thereof, is performed by the exercise of reasonable and ordinary care and diligence.
2. If a note is made payable at a designated bank for the convenience of the maker, with no objection by the payee to the place of payment, and is indorsed and delivered by the payee to another bank as collateral security for the payee's own note, and if the collateral paper falls due before the principal debt, it is the duty of the receiver of the collateral, in the absence of any sufficient reason to doubt the solvency of the designated bank, to lodge it with such bank for collection.

(Decided January 29, 1889.)

ERROR to the Circuit Court of Knox County.

The Knox County Savings Bank—the defendant in error—filed in the Court of Common Pleas of Knox County its amended petition, which reads as follows:

“The plaintiff, by leave of the court first had, files its amended petition, and avers that it is a corporation duly organized under the laws of Ohio, under the name of The Knox County Savings Bank, and fully authorized to loan money, and receive the notes hereinafter described.



## Bridge Co. v. Savings Bank.

"That the defendant is a corporation duly organized under the laws of Ohio, under the name of The Mount Vernon Bridge Company, and doing business and having its principal office at the city of Mount Vernon, in said county and state.

"The plaintiff states that on or about the 14th day of February, A. D. 1883, the defendant, being desirous of borrowing money, made and delivered to plaintiff their promissory note, of which the following is a true copy ;

'MT. VERNON, O., Feb. 14, 1883.

'Thirty days after date, for value received, we jointly and severally promise to pay The Knox County Savings Bank, or order, at their banking house, Mount Vernon, Ohio, twenty-eight hundred dollars, with interest, after maturity, at the rate of eight per cent. per annum, until paid. And we jointly and severally hereby authorize any attorney-at-law to appear for us or any of us, in an action on the above note brought against us, or either of us, by said Knox County Savings Bank, at any time after said note becomes due, in any court of record in the state of Ohio or elsewhere, to waive the issuing and service of process against us, or any of us, and confess a judgment in favor of said Knox County Savings Bank against us, or any of us, for the amount that may be then due thereon, with interest at the rate therein mentioned and costs of suit; and, also, in behalf of us to waive and release all errors and the right of appeal in said proceedings and judgment and all proceedings, petitions and writs of error therein. As witness our hands and seals, this 14th day of February, A. D. 1883.

'\$2,800.00.

'Due March 16-19, 1883.

'No. 2634.

'MT. VERNON BRIDGE COMPANY,

[SEAL.]

'J. N. KEADINGTON,

'Secretary.'

"To secure the payment of said note, the defendant duly endorsed and deposited with the plaintiff, as collateral security for the payment of said above mentioned note, and loan, two

notes or orders, one calling for one thousand and ninety-two dollars (\$1,092), which was duly collected, and after collection applied in part payment of said loan, and one note or order, on the Commissioners of Highways of Panola township, Woodford county, in the state of Illinois, in favor of the defendant, of which note or order the following is a true copy :

‘\$1,740.00. The Commissioners of Highways of Panola township, Woodford county, state of Illinois, will pay to the order of The Mount Vernon Bridge Company, seventeen hundred and forty dollars, without interest, payable at the El Paso Bank, El Paso, on the 10th day of March, 1883.

‘JAMES FORSYTHE,

‘MICHAEL GILBERT,

*‘Commissioners of Highways of Panola Township.’*

“ Plaintiff says that shortly before said claim fell due, its cashier consulted the defendant’s secretary and treasurer, who as such had had other and like business transactions with plaintiff, and who had negotiated said loan, as to its collection, whereupon plaintiff’s cashier according to the custom of banks in such cases and the usage of plaintiff in like cases, sent said collateral to the El Paso Bank, with instructions to collect and forward the money in the usual way—by exchange on New York. The plaintiff’s cashier received a letter from the officers of the El Paso Bank, bearing date the same day said collateral matured saying ‘that it had not been paid,’ which advice he promptly communicated to the defendants’s secretary.

“ Plaintiff says that the El Paso Bank, about the same time said collateral fell due, did receive the money on said collateral, and shortly thereafter failed. That on learning of the failure of the El Paso Bank, plaintiff immediately communicated that fact to the defendant’s secretary, who wrote to one of the agents of defendant then traveling in the west, to go to El Paso and look after the matter.

“ The plaintiff further says that it had no other business than what grew out of said collateral with the El Paso Bank, either before or since sending said claim for collection, nor did

plaintiff know of the existence of said bank before it received said collateral ; that so far as it could learn either through the commercial agencies, or otherwise, said El Paso Bank was in good credit when plaintiff forwarded said collateral for collection. Plaintiff says, there is not now, nor was there at the time plaintiff sent said collateral for collection, any other bank or collection broker in said town of El Paso, save the bank at which said collateral was made payable. That at the time said note or order was made payable at the El Paso Bank, the plaintiff had no connection with or knowledge of the making of such obligation. That the same grew out of a business transaction between the defendant and the Commissioners of Highways of Panola township. Plaintiff further says that since said \$2800 note fell due, the defendant wholly failed and refused to pay said note, or any part thereof, and claims that said payment of said order to the bank of El Paso was a payment to the plaintiff. Plaintiff therefore asks judgment against the defendant for the sum of seventeen hundred and nine dollars and 24-100 with interest."

To this petition, The Mount Vernon Bridge Company—the plaintiff in error—filed its answer, of which the following is a copy :

"And now comes the defendant and for answer to the petition of plaintiff, says, that it assigned and transferred to plaintiff, by its written endorsement thereon, the said \$1,740.00 order, and delivered the same to plaintiff under the circumstances and upon the consideration set forth in said petition, and never afterwards assumed or pretended to have any authority or control over the same or the manner in which it should be collected, and never assumed any of the risks incident to the collection thereof; that defendant never gave any advice or directions to plaintiff, or any of its officers, as to the place to which, or the persons to whom, or the agency through which, the collection of said order should be made, and never was consulted by plaintiff or any of its officers as to the manner or means of making said collection.

"Defendant says that it is true that shortly after the failure of said El Paso Bank, its secretary did write to one of defend-

---

Bridge Co. v. Savings Bank.

---

ant's agents then traveling in the west, to go to El Paso and look after this matter ; but defendant says that its secretary did so at the request of plaintiff, and wrote to defendant's said agent that the plaintiff, the Savings Bank, requested him to see Panola Township Commissioners, and state what time the money was paid in, etc.

" Defendant says that it never had any business transactions or business relations with said El Paso Bank, and in fact did not know of its existence until said order was delivered to it already executed ; that said order was made payable at said bank by the makers thereof merely for their own convenience in making payment, and without consulting defendant.

" Defendant says that it is not true that no other payments have been made upon said note than the \$1,092 endorsed thereon, but defendant says that the entire residue of said note had been fully paid and satisfied by the collection of said \$1,740 order, and that defendant is entitled to a judgment against plaintiff for the sum of thirty-two dollars (\$32), the residue thereof after paying the balance of said note.

" Wherefore defendant not gainsaying the other allegations of said petition, prays a judgment against said plaintiff for said sum of \$32, with interest thereon from the 13th day of March, 1883."

There was a demurrer to the answer, which demurrer was sustained, and judgment was rendered for the Savings Bank for the amount claimed, with interest and costs.

The judgment was affirmed by the circuit court, and to reverse such judgment of affirmance, a petition in error is filed in this court.

*A. R. McIntyre*, for plaintiff in error.

*Samuel Israel* and *William M. Koons*, for defendant in error.

DICKMAN, J. It is alleged in the original petition, that to secure the payment of the note upon which the action was founded, the Bridge Company indorsed and deposited with the Savings Bank, as collateral security, the note made by the Commissioners of Highways of Panola township. And the

---

Bridge Co. v. Savings Bank.

---

Bridge Company avers, that it assigned and transferred to the plaintiff below, by its written indorsement thereon, the note of the commissioners, and delivered the same to the plaintiff, under the circumstances and upon the consideration set forth in the petition. The Bridge Company and the Savings Bank, therefore, sustain towards each other, the relation of pledgor and pledgee. Notes deposited as collateral security are regarded as pledges, whether they have been indorsed and delivered as a part of the transaction of loan, or have been simply delivered without indorsement, where indorsement is required.

What then was the obligation resting upon the Savings Bank in reference to the collateral note which it held? The general rule is that, where negotiable instruments, executed by third parties, are indorsed and delivered as collateral security for the promissory note of the pledgor, so that the pledgee of them becomes a party thereto, and such collateral paper matures before the principal debt, the obligation of the pledgee in collection thereof is performed by the exercise of reasonable and ordinary care and diligence. As held in *Roberts v. Thompson*, 14 Ohio St. 1, where a party receives a note as collateral security for an existing debt, without any special agreement, he is bound to use ordinary care and diligence in collecting it, and such cases are not governed by the strict rules of commercial law applicable to negotiable paper. See *Reeves v. Plough*, 41 Ind. 204; *Lawrence v. McCalmont*, 2 How. U. S. 426; *Noland v. Clark*, 10 B. Mon. 239; *Miller v. Gettysburg Bank*, 8 Watts, 192.

We do not find, nor is it claimed, that there was any negligence, or want of due diligence on the part of the Savings Bank, in taking the proper steps for the collection of the collateral note or pledge. The facts, as admitted by the record are, that a short time before the collateral fell due, the cashier of the Savings Bank, according to the custom of banks and the usage of the Savings Bank in like cases, sent the collateral note to the El Paso Bank, where, by its terms, it was made payable, with instructions to collect and forward the money in the usual way—by exchange on New York. The cashier re-

ceived a letter from the officers of the El Paso Bank, dated the day the collateral matured, saying, "that it had not been paid," which information he promptly conveyed to the Bridge Company. But about the time the collateral fell due, the El Paso Bank did receive the amount due thereon, and shortly thereafter failed, and the Savings Bank immediately communicated that fact to the secretary of the Bridge Company, who wrote to one of that company's agents travelling in the west, requesting him to go to El Paso and look after the matter. Before receiving the collateral paper, the Savings Bank had no knowledge of the existence of the El Paso Bank, and when the collateral was forwarded to it for collection, that bank, so far as was learned through commercial agencies and otherwise, was in good credit, nor was there any other bank or collection broker at that time in the town of El Paso.

There was nothing to put the pledgee of the collateral on guard, or create suspicion as to the solvency of the collecting bank. Under the existing circumstances, it was the plain duty of the Savings Bank to lodge the collateral for collection at the designated bank, and in no other place. Had the Commissioners of Highways, with funds in hand and ready to pay, failed to find their note on deposit at the place appointed for payment, and afterwards become insolvent, the Bridge Company might well have charged the Savings Bank with supine negligence. So far as it pertained to the degree of care and diligence required of the Savings Bank as a pledgee, it was not for it to ask why the collateral note was made payable at a particular bank, or whether so made payable for the convenience of the makers or payee or both, unless, before forwarding it for collection, the pledgee had reason to doubt the good credit of the collecting bank—which it did not have in the present instance. The language of the instrument, and the delivery of it by the payee and owner as collateral security, without any new or qualifying direction, served as a notice and guide to the pledgee which it could not safely disregard. The pledgee, it is said, is a savings bank, but generally, while it is not among the powers and privileges of such institutions to make collections for the holders of negotiable paper, when

---

Bridge Co. v. Savings Bank.

---

they loan money upon collateral security, and it devolves upon them to collect such collateral, their duties, rights and liabilities as pledgees, are to be determined by the same rules and principles that govern natural persons.

It is true that it seems to be the accepted doctrine in America, that no presentment or demand of payment need be made at the specified place, on the day when a note becomes due, or afterwards, in order to maintain a suit against the maker. But if the maker has funds at the appointed place at the time to pay the note, and it is not duly presented, he will in the suit be exonerated, not, indeed, from the payment of the principal sum, but from the payment of all damages and costs in that suit. While, however, the payee and holder of the paper may, if he pleases, neglect presentment and demand at the appointed bank or place, the receiver of the paper as collateral, in the exercise of due care and diligence, should have the paper at the appointed place, for payment at maturity.

It is urged, however, in behalf of the plaintiff in error, that the Savings Bank received the note made by the commissioners of highways merely for the purpose of collection—the amount realized therefrom to be applied towards the payment of the note in suit. The El Paso Bank, it is claimed, was the agent of the Savings Bank—that payment to the agent was payment to the principal—and that, therefore, the loss of the collateral through the insolvency of the El Paso Bank, must be born by the Savings Bank, and not by the Bridge Company.

Granting that it was incumbent upon the defendant in error to transmit the paper at the proper time and to the proper place for payment, the defendant did not select the agent to collect the note, for that, as we think, had already been done by the plaintiff in error. It is alleged that the note was made payable at the bank by the makers, merely for their own convenience in making payment, and without consulting the payee. But the payee accepted and became party to the note, and delivered it as security without intimation that any other place of payment was contemplated, than that named in the body of the instrument. Nor can the bank as the *place* of payment, be separated from its officers who received, in due course of

business, the amount of the note from its makers. It is generally understood in the mercantile world when negotiable instruments are made payable at a particular bank, that the paper will in due time be lodged in that bank for collection, and that the bank through its proper officer will receive the money when paid by the debtor. In *Ward v. Smith*, 7 Wall. 447, Field, J., in delivering the opinion of the court, says: "It is undoubtedly true that the designation of the place of payment in the bonds imported a stipulation that the holder should have them at the bank, when due, to receive payment, and that the obligors would produce there the funds to pay them. It was inserted for the mutual convenience of the parties. And it is the general usage in such cases for the holder of the instrument to lodge it with the bank for collection, and the party bound for its payment can call there and take it up. If the instrument be not there lodged, and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay."

And in the early case of *Wallace v. McConnell*, 13 Peters, 136, it is stated by the court, that the place of payment in a promissory note, or in an acceptance of a bill of exchange, is always matter of arrangement between the parties, for their mutual accommodation, and may be stipulated in any manner that may best suit their convenience; and that when a note or bill is made payable at a bank, it is well known that, according to the usual course of business, the note or bill is lodged at the bank for collection; and, that if the maker or acceptor calls to take it up when it falls due, it will be delivered to him, and the business be then closed. Indeed, the common understanding is, that the appointment of the bank as the place where the note is to be paid, implies the agency of the bank in making the collection.

The El Paso Bank being, in our opinion, the appointee of the Bridge Company and the Commissioner of Highways, and not of the defendant in error, the decision in *Reeves v. The State Bank*, 8 Ohio St. 465, can have no immediate bearing upon the present case. The rule, resting upon the sound-



est judgment, was there laid down, that where a bank in this state receives for collection a draft payable in another state, and for the same purpose forwards the draft to its correspondent in such other state, the bank here is responsible to the owner for the conduct of such correspondent, and for the proceeds of the draft, immediately upon its collection by such correspondent. Such correspondent, it was held, is the agent of the bank here, and not the sub-agent of the owner of the draft; and payment to the agent is payment to the bank, unless there was some agreement or authority between the owner and the bank, beyond the mere fact of the draft being received for collection. It entered into the reasoning of the court of errors, in *Allen v. The Merchants' Bank of New York*, 22 Wend. 215, that when a note is left by the owner at a bank, and received for the purpose of being sent to some distant place for collection, he makes an implied contract with the bank, that the proper and expedient means shall be used to collect the note, and he presumes that proper agents will be employed. The owner having no part in the selection of those agents and the bank in making collections for its customers not rendering a gratuitous, but more often a lucrative service, it has been deemed not unreasonable to hold the bank responsible for the conduct of the agents it employs. But it can not, consistently with the facts in the present case, be said, that the Savings Bank was left to the exercise of its discretion, in the appointment of an agent to collect the note which it held as security. On the contrary, the El Paso Bank must be held to have been adopted by the plaintiff in error and the Commissioners of Highways, for their own convenience, as their agent for that purpose. For the foregoing reasons, we have reached the conclusion that the judgment of the circuit court should be affirmed.

*Judgment accordingly.*

Rhodes v. Weldy.

## RHODES v. WELDY.

*Wills—Provisions for after-born child—Construction of Sec. 5959 Rev. Stats.—  
Construction of ambiguous words and phrases.*

1. Where a testator devised his real estate to his wife for life, "and after her death to the heirs of her body begotten," a child born to him after the execution of the will is not "provided for in the will," in the sense of section 5959, Rev. Stats., which provides that: "If the testator had no children at the time of executing his will, but shall afterwards have a child living, or born alive after his death, such will shall be deemed revoked, unless provisions shall have been made for such child by some settlement, or unless such child shall have been provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption or revocation shall be received."
2. Where the same word or phrase is used more than once in the same act in relation to the same subject-matter and looking to the same general purpose, if in one connection its meaning is clear and in another it is otherwise doubtful or obscure, it is in the latter case to receive the same construction as in the former, unless there is something in the connection in which it is employed, plainly calling for a different construction.

(Decided January 29, 1889.)

**ERROR** to the District Court of Mahoning County.

The solution of this case depends upon the construction of section 38 of an act relating to wills, passed May 3, 1852, S. & C. Stat. 1622, which provides: "If the testator had no children at the time of executing his will, but shall afterwards have a child living, or born alive after his death, such will shall be deemed revoked, unless provisions shall have been made for such child by some settlement, or unless such child shall have been provided for in the will, or in such way mentioned therein, as to show an intention not to make such provisions, and no other evidence to rebut the presumption or revocation, shall be received." (Sec. 5959, Rev. Stats.)

The question in the case arises upon the following facts: In August, 1862, John Young made his will, by which he devised his real estate in the following words:

"Item first—I will and devise to my wife, Harriet Young, all my real estate wheresoever situate, to use and occupy as

to her may seem proper during her natural life, and after her death, to the heirs of her body begotten; but should she die without issue, then I will and devise the same to Frank Young and Jennie Young, children of my brother William Young, and to Eben Kirkpatrick, son of John Kirkpatrick, equally."

At the time of executing this will, the testator had no children. Soon thereafter, he enlisted in the United States Army, and remained in the service until April, 1865, when he died, seized of the lands in controversy, and named in the will.

In December, 1862, Elizabeth Rhodes, the plaintiff in error, was born of Harriet Young, being the only child of the testator. The will was duly probated. Elizabeth received nothing from the estate of the testator, and no provision was made for her by settlement.

After the testator's death, his widow intermarried with Samuel Weldy. To them were born five children, who are defendants in error, with their parents. Elizabeth intermarried with Washington S. Rhodes, her co-plaintiff, before the action below was commenced.

The question at issue arose in the original action, which was one by Elizabeth to contest the will upon the alleged ground that it was revoked by the fact of her birth after the will was executed, she being unprovided for by it.

The courts below held that the will contained a provision for her, and it is to reverse this holding that the present proceeding is prosecuted.

*Geo. M. Tuttle and Chas. Fillius*, for plaintiff in error.

*J. R. Johnston and H. H. Moses*, for defendants in error.

OWEN, C. J.—If Elizabeth was provided for by the will of her father, it was not revoked by her birth after its execution, and the judgment below should be affirmed. If there was such provision made, it is to be found in these words: "I will and devise to my wife, Harriet Young, all my real estate wherever situate, to use and occupy as to her may seem proper, during her natural life, and after her death to the heirs of her body begotten."

It will not be contended that this is a specific provision for the plaintiff. If it is a provision at all, it is so because the language is comprehensive enough to include her. It was evidently written with a view only to the maternity of the "heirs of her body begotten," and without reference to their paternity. It was intended as a comprehensive direction of the course which the property should take after the immediate object of the testator's bounty should die, unless she should die without issue, in which case, other direction is made in the will. Much learning and research have been expended in discussing the character of the devise in remainder, and whether it is a vested or contingent interest.

In the view we take of the case, this is wholly immaterial. The question is, has Elizabeth "been provided for in the will" in the sense of the statute. It is not conclusive of this question to say that a "disposition" has been made which may inure to her benefit. "Disposition" and "provision" are not necessarily convertible terms.

This statute has not heretofore been construed by this court. The question is not new, however, to the courts of several of the states, and of England.

In *Lamplugh v. Lamplugh*, 1 Peere Williams, 111, the question was, whether a younger of two sons was provided for in a certain settlement. By that settlement an estate was settled upon him expectant upon his mother's death.

The Lord Chancellor held that the younger son was unprovided for, notwithstanding the expectancy settled upon him, to take effect upon his mother's death, "for," he said, "the mother might survive the father many years, and in that time the younger son might starve if he were to have no other provision."

The case of *Willard's estate*, 68 Pa. St. 327, is, we think, directly in point. The Pennsylvania statute, then in force (Brightly's Purdon's Digest, 1477), provided that "when any person shall make his last will and testament, and afterwards shall marry or have a child, or children, *not provided for* in such will, and die, leaving a widow and child, or either a widow or child, or children, although such child or children be born

after the death of their father, every such person, so far as shall regard the widow or child, or children after born, shall be deemed and construed to die intestate, and such widow, child or children, shall be entitled to such purparts, shares and dividends of the estate, real and personal, of the deceased, as if he had actually died without any will."

In that case, W. W. Willard, the testator, executed his will on the 29th of August, 1864, and died on the 2d of September following, leaving his wife, Catharine E. Willard, *enceinte*, and two children, Anna C. and Lizzie P. Willard, by a former wife. On the 25th of February, 1865, a little over five months after the death of the testator, his widow gave birth to a son, Waldo Wickham Willard.

By the first item of his will, the testator gave the interest of three thousand dollars to his mother during her natural life, and at the death of his mother "this bequest to revert to my children and heirs." In the second item of his will he gave, among other things, a house and lot, which he valued at seven thousand dollars, to his wife, to be hers during her natural lifetime, and at her decease "this bequest of seven thousand dollars, to revert to my heirs at law, share and share alike."

In the opinion of Sharswood, J., it is said, page 330, "It is earnestly contended, that as this child Waldo would certainly be entitled to his equal share of these reversionary interests, he can not be said not to be provided for \* \* \*. Here, however, there was, in effect, no present provision whatever. For all the purposes of education and support, and that for an indefinite period, this son is left entirely dependent upon his mother, unless, indeed, by a sale of his reversionary interest. \* \* But how could even a vested reversionary interest be a provision, unless by a present sale of such reversionary interest? A contingent interest could also be sold. An interest may be vested, as in this case, although the period when it shall fall into possession is uncertain. Such an interest could not be sold for the maintenance and education of the minor, except at an enormous sacrifice. Yet, what could an orphan's court do under such circumstances? Refuse to sell, and throw the child for maintenance and education on the public; or make a scanty

---

Rhodes v. Weldy.

---

provision for a short period, by an immediate sacrifice of all his future estate. We hold, then, that a reversionary interest, whether vested or contingent, is not a provision for an after-born child, within the words or spirit of the statute."

The question was again before the same court, in *Hollingsworth's Appeal*, 51 Pa. St. 518, in which the court held that when "a testator gave all his estate to his wife, and if he should have any children living at his death, he appointed his wife guardian of such children during their minority, committing entirely 'to her affection, judgment and discretion, their maintenance, education and future provision; and which *guardianship I intend and consider as a suitable and proper provision for such child or children*;' he had no children at the date of the will, but two were born afterwards. Held, that he died intestate as to the children." Read, J., in delivering the opinion of the court, said: "This is clearly no provision for his children, such as is contemplated by our wills act, and the policy of the law."

The act above mentioned is the same act that was in force when *Walker v. Hall*, and the case of *Willard's estate*, *supra*, were decided.

The case of *Waterman v. Hawkins*, 63 Maine, 156, is also suggestive. By section 8 of the Revised Statutes of 1871, of that state, page 564, it is provided that "a child of the testator, born after his death, and *not provided for in his will*, takes the same share of his estate, as he would if his father had died intestate." And the question before the court was, whether, in the case under consideration, an after-born child *was provided for*, within the meaning of the statute.

The case arose out of the will of John P. McGlinchy, who died February 2, 1869, leaving his widow, *enccinte*, and his father surviving him. His will was executed January 7th, preceding. A child, Gertrude, was born two months after the testator's death. By his will the testator gave to his wife the house, land and furniture, where they lived, for her natural life, if she remained unmarried, providing, however, that "in case of her marriage the same is to become the property of my heirs, and its use to revert to them; and, in

any event, after her decease, the same is to descend to my heirs." All the rest of testator's property was given to his father. The posthumous child, Gertrude, was the sole heir-at-law of her father.

The real question before the court was, whether a child of a testator, born after his death, can, in any proper sense of the term, be deemed provided for in the will, by a general devise of a reversion to the heirs of the testator; and the court, all the judges concurring, held, it cannot be deemed so provided for.

Barrows, J., in the course of the opinion in that case, says: "A general devise of a reversion to the heirs of the testator, constitutes no such provision. It would rarely be available for the support of the child, when support is most needed; and while the insufficiency of the provision in the will might not entitle the posthumous child to claim a distributive share, in order to bar him it must definitely appear *that some provision relating expressly to him, was made.*" We are not required to say that if the child in such case was actually provided for by the execution of the will it must be considered revoked because the provision did not relate expressly to her.

So, a like statute has been recently before the Supreme Court of Massachusetts, in the case of *Bowen v. Hoxie*, decided September 5, 1884, and published in vol. 18, No. 23, of *The Reporter*, page 721, (Boston). The testator executed his will, February 28, 1880, and died, December 18, 1882, leaving a widow and six children by her, and three children of a former marriage. A little over three months after the testator's death another child, Paulina, was born. The testator by his said will, besides other bequests to his wife and nine children, then living, left the sum of \$50,000 in trust, to pay the income to his wife during her life, and after her decease, to pay over the interest and income thereof, annually, in equal shares, to my surviving children by my said wife Abby Elizabeth, with an ultimate distribution of the principal among them. There was no other provision for Pauline by the will, or otherwise. The Pub. Stat. C., 127, sec. 22 of Mass., provides that "when a child of a testator, born after his father's death, has

*no provision made for him by his father in his will, or otherwise, he shall take the same share of his father's estate that he would have been entitled to if his father had died intestate."*

It was contended by counsel for the child, Pauline, that there was no provision for her in the will, within the meaning of the statute.

Allen, J., in the course of the opinion, says: "In the opinion of the court, the claim in behalf of Pauline must be supported. The will would have full effect without regard to Pauline. The share, if any, which she would receive, would come to her only as one of a class. The provision for her is an unintentional one. The most that can be said is, that the provision for a class happens to be broad enough to include her. It does not, under any construction, furnish any certain means for her maintenance and education during that part of her life when she would be unable to do anything toward her own support.

"She might live long, marry, have children and die, without ever coming into the enjoyment of her share of an interest to which, as one of a class, she might be entitled. Such a result would not only shock the testator himself, but would be contrary to the common feelings of humanity. It is not necessary, and we do not think it is reasonable to hold, that a provision for a class, within which an un contemplated child happens to fall, excludes the child from a proportionate share of the estate. *The statute rather means to include cases where a child, born after the father's death, has no direct specific or intentional provision made for him.*"

"Its meaning is, if a father unintentionally omits to provide, in his will, or otherwise, for a child born after his death, or, in other words, if he omits to make a provision which is intended for such child, the child shall take the same share of estate that he would have been entitled to, if the father had died intestate. This construction is in accordance with that adopted by the courts of several states, substantially similar."

A case reported in 10 Ga. pp. 80, 81, 82, is instructive. The Supreme Court, construing a statute of that state, which is much like the Pennsylvania statute, says: "The statute



contemplates the present, or probable existence of the after-born child, in the mind of the testator, when he makes his will, and thereby makes a *positive provision* for such child. There being no such positive provision made by the testator in his will for this after-born child, we are of the opinion that this is a very clear case of intestacy under the statute."

In the case at bar there surely was no provision for the present support and maintenance of Elizabeth. It is now nearly twenty-six years since her birth, and there has been no time since that event that she could assert a present interest in the estate left by the will of her father. She has passed from birth to womanhood and is now a wife, and not a penny of this "provision" which it is strongly contended was made for her in the will, has enured or could lawfully enure to her benefit.

If it be contended that the devise to her, or which is made in terms broad enough to include her, is a vested interest—one which she could sell and realize therefrom present means—the answer is that she might also sell a contingent interest or a mere expectancy, if in either case she should find an adventurer brave enough to take his chances in an investment so equivocal and unpromising. In that case a sale would probably be at a great sacrifice. She may live to middle age, and even to moderately old age, and still fail to realize upon this alleged "provision," unless she should in the meantime be unfortunately called upon to mourn her mother's death. If she should die before her mother, it would result that she had passed through life without realizing the slightest benefit or assistance from the will. These considerations are suggested rather as illustrations of the practical workings of the rule contended for than as rules or tests of construction. They serve to illustrate, also, the authorities which are above cited.

The able and industrious counsel for defendants have failed to produce a case which tends to cast doubt upon any of these authorities, or to establish a different doctrine.

2. We are fortunate, however, in finding in this statute very valuable aid in its construction. In the same section—

indeed in the same sentence—we find substantially the same expression which has provoked so much discussion concerning what constitutes a provision in a will for an after-born child. The will shall be deemed revoked “unless provisions shall have been made for such child by some settlement,” etc. In either case the statute contemplates provision for a child which we are to suppose will be of tender years and in present need of means of support. If there be provisions by settlement or provision by will, in either case (and in the one the same as the another,) the birth of a child after the execution of the will does not work its revocation.

Fortunately for us, “provisions by some settlement” is a phrase of easy construction. It certainly implies, if not a sufficient, at least a substantial, present means of maintaining the child. A settlement at once suggests the intervention of trustees upon whom is conferred a fund or property in some form which constitutes a source of maintenance, education, etc. A provision by some settlement which could not become available until the termination of a life tenancy or interest, and which depended upon the contingency of the beneficiary outliving the life-tenant, and which, in case of the latter surviving the former could never and would never be devoted to the uses to which it was appointed, would be a strange absurdity. *Lamplugh v. Lamplugh*, *supra*, is directly in point.

When we have ascertained what a provision for a child of tender years by some settlement is, we shall have made good progress in the solution of the question at bar. It would not be a sound proposition to say that the same word occurring in different places in the same statute always means the same thing. It may sometimes call for a radically different construction. But where the same word or phrase is used more than once in the same act, especially in the same section and in the same sentence, in relation to the same subject-matter and looking to the same general purpose, it is a fundamental rule of statutory construction that if in one connection the meaning is clear and in the other it is otherwise doubtful or obscure, it is in the latter case to be construed the same as in the former. In *Raymond v. Cleveland*, 42 Ohio St. 529, it is

said: "Where the meaning of a word or phrase in a statute is doubtful, but the meaning of the same word or phrase is clear where it is used elsewhere in the same act or an act to which the provision containing the doubtful word or phrase has reference, the word or phrase in the obscure clause will be held to mean the same thing as in the instances where the meaning is clear."

It is said in *James v. DuBois*, 1 Harrison (N.J.), 293: "It is no doubt a rule of construction, that if a statute makes use of a word in one part of it susceptible of two meanings, and in another part of the statute the same word is used in a definite sense, we are to understand it throughout in that sense, unless the object to which it is applied, or the connection in which it stands, require it to be differently understood in the two places."

In *Pitte v. Shipley*, 46 Cal. 160, the court say: "It is a familiar principle of construction that a word repeatedly used in a statute, will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is another meaning intended."

This rule is peculiarly applicable to the question at bar. The general subject treated in these two expressions is the same, to-wit: A provision for an after-born child which shall save a will from the revocation which must otherwise result from the birth of such child after the execution of the will. Giving to the word "provision" in the one phrase substantially the same construction which the word "provisions" is clearly entitled to in the other, and the conclusion is that Elizabeth was not "provided for in the will" by the devise of the testator's lands to his wife to use and occupy as to her may seem proper, during her natural life, and after her death to the heirs of her body begotten; and the *judgments below are reversed*, and the cause remanded to the circuit court for further proceedings.

O'Dell, Assignee v. Leyda et al.

## O'DELL, ASSIGNEE v. LEYDA ET AL.

*Bailment—Rights of bailor and bailee—Warehousemen.*

1. A warehouseman received wheat from farmers, and stored it in his warehouse, giving receipts for it, in the following form :

“BIG PRAIRIE, Sept. 9, '82.

“Rec'd of George Leyda, 173 bu. 20-60 one hundred & seventy three bus twenty lbs of No 2 Wheat. Owner of stored wheat at their own risk.

“W. H. EASTERDAY & BRO.”

Nothing was charged for storage, and no time was fixed during which the wheat should remain in store, except that it was to be left until the person storing it should be ready to sell. There was no agreement that the wheat should be mixed with other wheat, or, that the warehouseman might sell, ship, or consume it. When it was stored, the warehouseman mixed it with wheat of his own, of the same grade and quality, and sold from the common mass, but never more than his own quantity, always reserving enough to return to each depositor his proper quantity.

*Held :*

- (a.) The transaction with each depositor constituted a bailment, and not a sale.
- (b.) The title of the depositors to their wheat was not extinguished, or transferred to the warehouseman, by mixing it with other wheat, belonging to him ; but each depositor retained a property in his share of the common stock, and the warehouseman could not take from it more than his appropriate share, without a violation of his contract of bailment.
2. Where a warehouseman, who has received on deposit in his warehouse, the grain of others, to be stored at their risk, mixes it with his own, and without authority from them, sells from the common mass, but never more than his own quantity, always reserving enough to return to each depositor his proper quantity, of the same grade and quality, but not the grain so deposited, the depositors may claim the grain so substituted for their's ; and, if it be for their benefit to accept the substitution, such acceptance will be presumed, and their title upheld, against the warehouseman, and his assignee for the benefit of creditors.

(Decided January 29, 1889.)

**ERROR** to the Circuit Court of Holmes County.

In September, 1882, William H. Easterday was a warehouseman, at Big Prairie, in Holmes county ; and on the 29th day of that month, George W. Leyda, the plaintiff in the action below, stored one hundred and seventy-three bushels of wheat in Easterday's warehouse, and took from him a receipt in the following words :

"BIG PRAIRIE, Sept. 9, '82.

"Rec'd of George Leyda 173 bu. 20-60 one hundred & seventy three bus twenty lbs of No 2 Wheat. Owner of stored wheat at their own risk.

"W. H. EASTERDAY & BRO."

There was no agreement that the wheat should be mixed with other wheat, or that Easterday might ship or sell, or otherwise dispose of it; nor was there any specified time agreed upon, during which the wheat should remain in the warehouse, but it was to be kept until Leyda was ready to sell.

About the time Leyda deposited his wheat, several other farmers of that vicinity, in the same way, and upon like terms, stored in the warehouse wheat belonging to them, which, with Leyda's wheat and wheat belonging to Easterday, was mixed in a common mass in large bins kept in the warehouse. The wheat so mixed was of the same grade and quality. Easterday from time to time sold out of these bins, but always kept therein enough, and sometimes more than enough, to return to the persons so storing their wheat, their respective amounts. He never took out of the common mass more than his own, and always reserved the amount in store, but not the identical wheat stored.

On the 25th day of January, 1883, Easterday made an assignment, for the benefit of his creditors, to John B. Odell. At the time of the assignment, Leyda had not sold his wheat, and there was in the bins in the warehouse enough of the wheat to restore to each of the depositors their respective quantities, and of a like quality and grade.

The assignee took possession of the warehouse, and on the same day the sheriff levied an execution on the wheat, issued on a judgment against Easterday. Thereupon Leyda commenced his action of replevin against the assignee and sheriff, and under his writ took from the common mass the quantity of wheat so stored by him. The other depositors pursued the same course. On the trial of Leyda's case the foregoing facts were established, and there was no substantial conflict in the

---

O'Dell, Assignee v. Leyda *et al.*

---

evidence. At the conclusion of the argument, his counsel requested the court to charge the jury that "If the jury found that Easterday shipped from the common mass of mixed wheat, but always left more than was necessary to meet the demand of depositors, including plaintiff, then plaintiff would have a right to replevy from the common mass enough to satisfy the amount he deposited." The court refused to so charge, and on this subject instructed the jury that "If the stored wheat mixed with plaintiff's wheat was sold and shipped, though kept separate from wheat intended for shipment, and other wheat was bought and put into the warehouse in the same bins where the stored wheat had been placed, then that would be a conversion of the wheat which would give plaintiff a different remedy. He then would not have the right to take by replevin—that is by this suit—the other wheat bought and placed in the bins in the same or different places from which the stored wheat was taken, though the amounts were exactly the same, but must bring his action for the price and value, or in this case present his claim to the assignee and collect his money for the value of the wheat as other creditors." The plaintiff duly excepted, and the jury having returned a verdict against him, he in due time filed his motion for a new trial, which was overruled, and judgment entered on the verdict. He thereupon prosecuted error to the circuit court, where the judgment was reversed and the cause remanded for a new trial. To reverse which judgment of reversal the assignee prosecutes this proceeding in error.

*Samuel B. Eason and Newton Stillwell, for plaintiffs in error.*

*Edward S. Dowell and Reed & Hoagland, for defendants in error.*

WILLIAMS, J. The receipt which Easterday gave to the plaintiff, when he stored his wheat in the warehouse, interpreted according to its terms and commercial usage, evidences a bailment and not a sale; and the property in the wheat remained in the plaintiff. The obligation of Easterday was to use due care during his possession of it, and return it to the

owner when he should require it. And this relation of the parties was not changed, or the plaintiff's title extinguished, or transferred to the bailee, by mixing the wheat with wheat of like quality and grade, stored by others on like terms, or with the wheat belonging to Easterday.

"When the owners of wheat consent to have their wheat, when delivered at a mill or warehouse, mixed with a common mass, each becomes the owner in common with the others, of his respective share in the common stock. And this would not give the bailee any control over the property which he would not have, if the wheat of each one was kept separate and apart. \* \* \* If a part of the wheat held in common belong to the bailee himself, he could not abstract from the common stock any more than his own appropriate share without a violation of the terms of the bailment." *Chase v. Washburn*, 1 Ohio St. 244, 252.

It was held in *Inglebright v. Hammond*, 19 Ohio, 337, that "where a person taking his wheat to a mill to be ground, by the assent of the miller mingles it with the wheat of the miller, he does not thereby lose his property in the wheat, but retains a property in so many bushels of the common stock as he has put in; although by a contract between the parties, the person delivering it is to receive a certain quantity of flour for a certain number of bushels of wheat."

In Wells on Replevin, sec. 203, it is said that "where from the very nature of the property the different articles are incapable of being distinguished, and where such separation, could it be made, would not be of the least advantage to any one, the just rule and the current authorities is, that each must take his share from the common mass. Thus, when like grain of different owners is mixed, the separation is not only impossible, but the failure to make it can not injuriously affect either party in the slightest degree. And in all such cases when the mixture has been by consent, or under circumstances in which the mixture would be reasonably expected by both, or when it has been occasioned by accident, or mistake, and without any wrong intent, the law will give to each his just proportion, for the reason that in such case the

---

O'Dell, Assignee v. Leyda et al.

---

mixture does not change the title, nor are the consequences such as follow the mixture of ingredients incapable of separation." "The law is well settled," says the same author, "that, where property can not be identified or separated so as to be seized, replevin is not the proper remedy. But in cases like the preceding, where the goods mixed are of the same kind, though not capable of separation by identification, yet if a separation and delivery can be made of the proper quantity without injuriously affecting the remainder, each may claim his share from the general mass, and may employ this action to secure it." Wells on Replevin, sec. 205.

And *Inglebright v. Hammond*, *supra*, announces the same doctrine, as follows: "Where an article of the same kind and value, which is calculated by the bushel or pound, is mingled together by the consent of parties, each party is entitled to have divided to him so many pounds or bushels as he may have put in—and is recognized in law to have a property in so much as he may have put into the common stock."

It remains to be considered whether the agreement of the parties, at the time the wheat was deposited, or their subsequent conduct, establishes a different relation between them, or materially affects their legal rights. There is no substantial discrepancy in the statement of the parties concerning the agreement, which simply was, that the wheat should be deposited free of storage at the owner's risk, to remain in the warehouse until Leyda was ready to sell, when, it was expected Easterday would buy it, but if he did not, and it should be sold to another, he was to deliver to the purchaser. There was no agreement that Easterday might ship or sell the wheat, or have any dominion or control over it, other than its possession while it remained in storage. The agreement, therefore, did not constitute a sale, but a bailment. It appears from the testimony of Easterday, that Leyda and others brought their wheat to his warehouse to be stored, and it was put in bins with other wheat of the same grade and quality belonging to Easterday. Out of these bins Easterday sold wheat, but never took out more than his own. He says: "I never



took out of the common pile more than my own. I would take my portion and sell it. I always reserved the amount in store, but not the identical wheat." He further testified that there was nothing said between him and the persons who stored their wheat about mixing it with his or other wheat. The practical question presented by the exceptions to the charge of the court, and the refusal to charge as requested, therefore is, whether, upon the foregoing state of facts, it was essential to the plaintiff's right to maintain his action of replevin for his portion of wheat from the common mass, that the specific wheat stored should continue to be part of the common mass from which the property was taken under the writ. In other words, does the fact that Easterday sold out of the common mass of stored wheat his own portion, but always keeping and reserving enough to meet the demands of his depositors, deprive a depositor of his remedy by replevin, unless it be shown that the identical wheat deposited remained and constituted part of the common mass?

The jury were instructed, that if the stored wheat was sold and shipped by Easterday, though kept separate from wheat intended for shipment, and other wheat was by him put in its place, the plaintiff could not by replevin take his portion from the substituted wheat, but that his remedy would be to recover by action the value of the wheat, or present his claim therefor to the assignee as other creditors. This instruction is in no way qualified, nor is its application made to depend upon the agreement of the parties, or upon any other fact. It defeated the plaintiff's action, if the jury found that the stored wheat had been removed by Easterday, although the agreement required that it remain in the warehouse, and gave Easterday no power of sale or disposition over it, and notwithstanding he substituted for it and in its place, other wheat of like quantity, grade and quality, for the purpose of preserving to the plaintiff the ownership of the property his receipt represented. There can be no doubt, that if, by the terms of the contract, Easterday had been authorized, at his pleasure, to take from the common mass of stored wheat, and appropriate it to his own use, or otherwise dispose of it, and pay for it either

in money or with other wheat, the title and dominion of the property would have passed to him upon delivery, as fully as in case of an ordinary sale, and he would have become a debtor for its value. *Chase v. Washburn, supra.* Nor can it be doubted that where the contract is purely one of bailment, and the bailee in violation of his duty under it, sells the property, or converts it to his own use, the bailor may bring an action against him for its value; and it will be no defense that the bailee has put other like property in its place. But is that the only remedy of the bailor in such case? May he not waive the tort and take the property? If the bailee chooses to supply the place of the property he has wrongfully disposed of, with other property of the same kind and value, why should he complain if the bailor, instead of suing for the wrong, take the property which has been put in the place of his? A bailee, like other agents entrusted with property, holds by a delegated right, and, as a general rule, is not permitted to dispute the title of his principal, or set up any personal claim to the property, but is held bound to restore the property to his bailor; and, when a transfer of the property by the agent is tortious, the principal may elect to sue for the tort, or reclaim the property, or hold the agent as his trustee for whatever he has received for it. Wharton on Agency, sec. 240, 414.

“And not only may the principal, in many cases, follow his own property into the hands of third persons, where it has been transferred or disposed of by an agent, contrary to his instructions, or duty, but the principle is still more extensive in its reach; for, if it has been converted into, or invested in other property, and can be distinctly traced, the principal may follow it, wherever he can find it, and as far as it can be thus traced, subject, however, to the rights of a *bona fide* purchaser for a valuable consideration without notice, in all cases where the latter is entitled to protection. It will make no difference, in law, as, indeed, it does not in reason, what change of form, different from the original, the property may have undergone, whether it be changed into promissory notes, or other securities, or into merchandise,

or into stock, or into money. For the product of the substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such." Story on Agency, sec. 229.

If Easterday had exchanged the grain which the plaintiff stored in his warehouse, for the wheat that was replevied, the plaintiff's right to maintain the action would be indisputable; and yet, in such case, the grain deposited would be removed, and other grain substituted for it. Exactly the same condition ensued, when Easterday sold the stored wheat, and put other wheat which he purchased in its place. Though the transaction was not strictly an exchange, the substitution was complete; and unless substance must yield to name and form, it can make no difference that the process by which the substitution was effected, is not called an exchange, and it was accomplished by two steps instead of one. "Suppose, however," says an able writer on this subject, "the warehouseman having a large order to fill, and having grain enough on hand to answer that and satisfy all outstanding receipts, for convenience of loading empties the bins into the purchaser's car, and immediately refills it with the amount for which his receipts are out. It seems pretty clear that the law ought not to say that the receipt-holders have no longer a right of property; but that it could with advantage presume from the ordinary course of business that the refilling of the bin amounted to an appropriation of the grain to the receipts, and that it was assented to by the receipt-holders." "The duty of owners of an elevator," continues the same writer, "is not alternative, but single. It is to deliver the amount receipted for, and nothing else. It is further to keep that amount on hand in that elevator and to deliver from that elevator. This is wholly different from the undertaking of bankers. They do not assume any duty to keep on hand a pile of dollars or sovereigns, out of which a delivery may be demanded by their customers. They are guilty of no breach of duty to him, if they part with their last coin, provided that when he draws on them they find means to honor his check. In the other case, there is a specific fund at every

---

O'Dell, Assignee v. Leyda *et al.*

---

moment, determined by locality, either the bin or the elevator, as may hereafter be held, to the whole or a part of which the receipt-holder may look." 6 Am. Law Rev. 467, 469.

There could have been but one purpose in always keeping on hand, in the warehouse, sufficient grain to return to the depositors their proper amounts, and that was to enable Easterday to keep good his contracts with them, and meet his receipts as they might be presented. The depositors were at liberty to regard his conduct in this respect as an appropriation by him, of the necessary quantity of grain on hand, to meet their receipts and contracts; and, since such grain is the exact equivalent of, and undistinguishable from, that deposited by them, and the appropriation is manifestly for their benefit, their acceptance of it may be presumed. This is undoubtedly so, as between Easterday and the depositors; for, if they choose to accept the substitution, he can not assert his own violation of obligation and duty, to defeat it. And we are of opinion that his assignee can not. In *Grove v. Brien*, 8 Howard (U. S.) 429, it is held, that where a manufacturer of goods consigns them to another, for the purpose of securing a pre-existing debt, there is no necessity of the consignee expressing his assent to the transfer, in order to the vesting of the title; and his title will be upheld, as against attaching creditors of the consignor, whose attachments were levied before the property reached the consignee, and before he had notice of the consignment. In the opinion of the court, Mr. Justice Nelson says: "No expression of assent of the person for whose benefit the assignment is made, is necessary to the vesting of the title, as the creditor is rarely unwilling to receive his debt from any hand that will pay him."

Upon the same principle, where a warehouseman, who has received on deposit in his warehouse, the grain of others, to be stored at their risk, mixes it with his own, and without authority from them, sells from the common mass, but never more than his own quantity, always reserving enough to return to the depositors their proper quantity of the same grade and quality, but not the grain so deposited, the depositors may claim the grain so substituted for theirs; and, if it be for their benefit.

to accept the substitution, such acceptance will be presumed, and their title upheld against the warehouseman and his assignee for the benefit of creditors.

This conclusion finds support in the case of *Inglebright v. Hammond*, before cited. That was an action of replevin by Hammond for ten barrels of flour, which had been levied upon by Inglebright, a constable, as the property of Webb. Webb was a miller, and Hammond delivered wheat at the mill, under an agreement that Webb should grind it, and for every four and one-half bushels of wheat furnished by Hammond he was to receive one barrel of flour; Hammond's wheat was mixed with Webb's, and from this mixed mass Webb manufactured flour and sold it to others. Before he had manufactured and delivered to Hammond all the flour he was entitled to, Webb absconded, leaving a quantity of wheat in the mill, which he instructed the miller to grind, and deliver the flour to Hammond. After it was ground the constable levied upon it at the suit of Webb's creditors, and Hammond replevied. The trial court was requested to instruct the jury, that if they should find there was an agreement, express or implied, at the time the wheat was delivered, "that Hammond was to receive flour for it, without reserving flour to be made out of the specific wheat delivered, that a sale of the wheat, and not bailment is imported." The court refused the charge, and this was assigned as error. In disposing of this assignment of error, it is said by Caldwell, J., in the opinion, that "there was one proposition embraced in this charge that we think was erroneous; and that was, that if Hammond was to receive flour for the wheat, unless such flour was made out of the specific wheat delivered, the jury should consider it a sale of the wheat, and not a bailment. We have already given our views of the law in reference to the mingling of wheat by the consent of the owners, or other articles admitting of a similar division. Each party retains the property in a quantity equal to what he has put into the common stock. Nor do we think that it necessarily alters the case that the party is to receive his return in flour, as is alleged in this case, at a barrel of flour for so many

bushels of wheat. This is but another mode of dividing to the party his property in the flour, in which it was agreed by the parties it should be received. If so many pounds of flour was considered as equivalent to a bushel of wheat, then receiving flour at that rate would, to all intents and purposes, be the same as a division of the wheat. We think then that it was not necessary to create a bailment, that the flour should be made out of the specific wheat delivered, and that the court did not err in refusing the charge."

The case of *Ledyard v. Hibbard*, 48 Mich. 421, was very much like the one under consideration. The defendants, who were millers, received wheat from farmers and stored it in their mill elevators, giving receipts substantially like those given by Easterday, except they contained the following additional clause: "at 10 cents less Detroit quotations for same grade when sold to us." The wheat was stored in bins, "from which the defendants drew from day to day, for the purpose of their business and manufacture. The quantity in the bins changed from day to day, as it was depleted by drafts, and replenished by new deposits." The defendants having failed, the plaintiff brought replevin for his quantity of wheat, and recovered. It was contended by the defendants that the wheat was not delivered for storage merely, but that "in addition to the bailment it was the understanding that it might be and would be put into the current consumable stock, and was therefore a sale." On the other hand it was claimed by the plaintiff, that the storage of his wheat in the elevator made him owner in common with others, and he might reclaim his own at any time, so long as the requisite quantity remained. The contention in the case was whether the transaction constituted a bailment or sale; and it was held to be the former. Judge Cooley, in speaking of the legal consequences of such relation, and the legal rights of the parties in such case, says: "If as warehousemen they gave warehouse receipts for grain received in store, the receipts must be construed by their terms and by commercial usage; in commercial circles they would be understood to represent the title to the quantity of grain specified; and though the quantity in store might fluctuate

from day to day as grain would be received and delivered out, this would not affect the title of the holder of receipts, who would be at liberty to demand and receive his proper quantity at any time, if so much remained in store. But if the quantity in store is reduced by consumption instead of by shipment or sale, it is not apparent that the rights of the holder of the receipts should be any different. It is true if the wheat is all consumed, and the amount in store is not kept good so that a demand for the wheat can be responded to, and if the consumption is by consent of the owner, express or implied, the consumption under such circumstances may be justly regarded as a meeting of the minds of the parties upon a sale; but so long as grain is kept in store from which the receipts may be met, the fair presumption is, that it is intended they shall be so met; and this presumption would only be overcome by some act unequivocal in its nature."

Whatever difference of opinion there may be, as to whether the facts of that case created a bailment, it having been held to be such by the court, the legal consequences ascribed by the learned judge to that relation of the parties meets with our approval.

We are therefore of the opinion that in giving the instruction to the jury complained of, without the qualification contained in the charge requested, the court of common pleas erred, and its judgment was properly reversed.

*Judgment affirmed.*

---

ENSEL v. LEVY & BRO.

*Estoppel in pais—When it arises.*

An *estoppel in pais* arises where one is prejudiced by the willful act or declaration of another upon whose conduct the former has rightfully acted. Hence, where the owner of goods sells to one on credit, and knowingly delivers to him a receipt drawn in such form, and given under such circumstances as to cause an innocent purchaser, buying from the vendee, rightfully to believe that the goods will be delivered upon compliance by said purchaser with certain conditions in the receipt

---

Ensel v. Levy & Bro.

---

contained, and he parts with his money in good faith upon the belief thus created, such purchaser has the right to avail himself of the terms of the contract and the vendor is estopped to afterward set up a lien for purchase-money and insist upon its payment as further condition to delivery of the goods.

(Decided January 29, 1889.)

### ERROR to the Superior Court of Cincinnati.

This action was brought to recover the sum of eighteen hundred and thirty-seven dollars, being the value of seventy-five barrels of whisky alleged to be the property of plaintiff, which defendants had converted to their own use. At the trial in the superior court, judgment was given for defendants.

From the finding of facts made by the court, it appears that in 1880 and 1881, and before and since, Thomas B. Ripy was owner and manager of a distillery, near Lawrenceburg, Anderson county, Kentucky, which distillery was a government bonded warehouse. In 1881, the defendants, who resided and did business then and since in Cincinnati, Ohio, purchased of said Thomas B. Ripy a large number of barrels of whisky, made and stored in said distillery and warehouse, including the barrels of whisky in litigation in this action, and paid for the same. Ripy gave therefor, to the defendants, warehouse receipts, among which were fifteen corresponding in serial numbers and number of barrels to the whisky referred to in the petition. The defendants, on the 8th of September, 1881, sold to G. Baum, doing business as G. Baum & Co., of Memphis, Tennessee, the barrels of whisky in litigation in this action, the sale being transacted at Memphis, Tennessee, through a broker of the defendants, and being a sale upon time, at four months. On September 8, 1881, the original warehouse receipts of Ripy, hereinbefore referred to, for the whisky in litigation, were attached to a note at four months, and sent by the defendants to Baum & Co., at Memphis, to be signed, but were returned by the latter firm to the defendants, both note and receipts, they refusing to sign the note with the warehouse receipts attached to it. Afterward, on October 29, 1881, Baum & Co. signed three acceptances due in four months, and the de-



fendants, retaining, with the knowledge of Baum & Co., the original warehouse receipts (which were intended to be delivered if they had accepted them and attached them to the note), sent them the fifteen so-called warehouse receipts referred to in the petition, of the serial numbers and number of barrels set forth in said petition, and which were in form following:

"Distillery Warehouse Receipt. Cincinnati, September 8, 1881. Received in the bonded warehouse of Thos. B. Ripy's Distillery No. 112, fifth district of Kentucky, the whisky hereinbelow described. To be held for account of and subject to the order of G. Baum & Co. Deliverable only on return of this receipt to us properly endorsed, and on payment of U. S. Government tax and charges on same. Storage on said whisky at the rate of five cents per barrel per month, from Sept. 8, 1881. Loss or damage by fire, the elements, shrinkage or natural decay, at owner's risk."

Then followed the marks and serial numbers, number of gallons, distiller's name "Thomas B. Ripy, Fifth District Kentucky," and number and description of packages; twenty of the receipts being for five barrels each, and one for nine, and the serial numbers corresponding to the number in the receipts from Ripy. Upon the face of each was the following: "Notice. In order to insure prompt withdrawal, send this warehouse receipt with your order. No whisky will be unbonded unless the warehouse receipt accompanies the order, for credit of the quantity withdrawn." In the margin was printed the Kentucky law entitled "an act in relation to warehousemen and warehouse receipts." These receipts were signed, "James Levy & Bro."

The whisky was then, and has always been and still is, in Ripy's distillery warehouse. The acceptances of Baum & Co., given as aforesaid, were not paid, and said acceptances are, and have been, in the possession of the defendants from that time. Baum & Co. never paid for the whisky.

Afterward the receipts were pledged by said Baum & Co. as a security for a loan of about \$2,700 then obtained thereon by said Baum & Co. from Walker's Sons & Co., of Memphis,

---

Ensel v. Levy & Bro.

---

Tennessee, who received the receipts in the due course of business as security for the loan, and as representing the whisky referred to therein. Afterward, on the 18th of November, 1881, Baum & Co. made an assignment, under the insolvent laws of Tennessee, for the benefit of their creditors. After the assignment, the loan of Walker's Sons & Co. remaining unpaid, said receipts came into the possession of the plaintiff by purchase for value, in the due course of trade from Walker's Sons & Co., which sale of whisky, as represented by said receipts by Walker's Sons & Co. to the plaintiff, was upon due and proper notice to Baum & Co. The plaintiff purchased the same "without knowledge or notice of the fact that the defendants retained in their possession the warehouse receipts issued by Ripy, except that notice thereof was conveyed upon the face of the so-called warehouse receipts themselves, and by the statutes of the United States."

That, at the date of the purchase by said Baum & Co., they were insolvent in the popular sense, that is, were unable to pay their debts, including the one to the defendants, had they been presented for payment at that time, and continued so insolvent until the maturity of this debt, and until after plaintiff's demand for the delivery of the whisky in suit, and continue still so insolvent. That the value of the whisky, when demand was made, over and above storage charges, was the amount agreed upon by the parties; that is, eighteen hundred and forty-five dollars (\$1,845).

*Long, Avery, Kramer & Kramer*, for plaintiff in error.

*J. Shroder and Wilby & Wald*, for defendants in error.

SPEAR, J. The case seems to have turned in the superior court upon the question whether or not the receipts delivered by the defendants to Baum & Co., were warehouse receipts, and much argument has been adduced in the briefs of counsel upon that question. But we think the real question is not whether those papers were, in form or substance, warehouse receipts, but whether or not the firm which executed and put them in circulation may, as against an innocent holder, be

permitted to set up any claim to the property, or insist upon any condition of delivery other than those contained in the instruments. Can they now allege that the purchase-money has not been paid, and make such payment a condition of delivery of the goods? In other words, do the facts show a case of estoppel *in pais*?

The general doctrine of estoppel is stated in varying forms. Blackstone says an estoppel arises "where a man hath done some act, or executed some deed, which estops or precludes him from averring anything to the contrary." Coke says it arises "where a man is concluded, by his own act or acceptance, to say the truth."

Swan, J., in *McAfferty v. Conover*, 7 Ohio St. 105, observes that "estoppels *in pais* are not allowed to operate, except where, in good conscience and honest dealing, the party ought not to be permitted to gainsay his admission. And, in general, the act or declaration of the party must be willful, that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party," though, farther on in the same case, he adds: "Whether it be a rule without exception, that an estoppel *in pais* must always be accompanied with the willful act or declaration of the party upon whom it is to operate, we do not decide."

In *Beardsley v. Foot*, 14 Ohio St. 416, Scott, J., remarks: "We think an estoppel may arise from admissions and declarations made without any fraudulent purpose. The circumstances may be such, that 'good conscience and honest dealing' may require a party to bear the consequences of his own negligent mistake, instead of throwing the resulting loss upon another whom he has misled." In this case Foot had purchased land upon which Beardsley had a lien. Before doing so he applied to the latter—whom he found attending an agricultural fair—for the purpose of ascertaining whether he held any claim or lien upon the land, informing him that he (Foot) expected to purchase if he could get a good title. Beardsley, in reply, gave a positive assurance that he had none, and Foot, relying on this assurance, purchased and paid for the land. An examination of the county records would have disclosed

---

Ensel v. Levy & Bro.

---

the lien. Beardsley was held estopped to set up his lien as against Foot's title. The syllabus is: "Admissions *in pais*, though made in good faith, may yet be made under such circumstances as to operate by way of estoppel, and preclude the party from afterward gainsaying them."

In *McKenzie v. Steele*, 18 Ohio St. 41, Welch, J., says: "To work an estoppel there must be prejudice to the party setting it up, and also fraud or bad faith—or their equivalent, gross negligence—in the party to be estopped."

In *Pickard v. Sears*, 6 Ad. & Ell. 474, the rule is stated thus: "Where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." And Parke, B., in *Freeman v. Cooke*, 2 Exch. 662, giving assent to the above rule, adds: "By the term 'willfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representations to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth."

From the foregoing, it is fair to assume, that where one, by his acts or declarations, made deliberately and with knowledge, induces another to believe certain facts to exist, and that other rightfully acts on the belief so induced, and is misled thereby, the former is estopped to afterwards set up a claim based upon facts inconsistent with the facts so relied upon, to the injury of the person so misled. Applying this rule reasonably to the case at bar, what answer should be made to the demand that new conditions as to delivery shall now be attached to the receipts? By their refusal to execute the note with the warehouse receipts attached, Baum & Co. gave the defendants clearly to understand that they would not

---

Ensel v. Levy & Bro.

---

assent to the condition thus imposed, and as clearly indicated that the possession of apparent title to the goods without condition, save as to payment of government tax and storage, would be insisted upon. Acceding to this, the receipts signed by Levy & Bro. were substituted, and the acceptances taken by defendants in place of the note. This change was desired by Baum & Co., in order that they might make use of the receipts to raise money, and this purpose, or one of equivalent nature, must have been inferred by Levy & Bro. At least, as reasonable men, they ought to have known or inferred it. Of what possible use could the substituted receipts, in the form they were given, have been to Baum & Co., if not for just such purpose? And it is not improbable that Levy & Bro. assumed that the possession of the receipts, printed in the form they appear, would the more easily enable Baum & Co. to make sale of the goods, and thus the acceptances received by them the more surely be paid. Such expectation would not have been an unreasonable one. At all events, they issued the receipts with notice that they might be so used. Can they now, as against an innocent purchaser, disclaim knowledge of an intention to so use them?

The receipts were in a form well calculated to deceive. They were gotten up in the similitude of real warehouse receipts. The heading was "Distillery Warehouse Receipt." The only conditions attached to delivery are return of receipt and payment of tax and storage. In the body it is recited that the whisky is held for account "of and subject to the order of G. Baum & Co., deliverable only on return of this receipt to us properly indorsed, and on payment of U. S. government tax and charges on same." At the foot the notice printed is: "In order to insure prompt withdrawal, send this warehouse receipt with your order. No whisky will be unbonded unless the warehouse receipt accompanies the order, for credit of the quantity withdrawn." On the margin of each, as on each warehouse receipt, was printed in full the laws of Kentucky, relating to warehousemen and warehouse receipts, though, except to facilitate deception, that act had no more to do with the receipt than a chapter from the Koran.

---

Ensel v. Levy & Bro.

---

A purchaser would naturally be led to suppose the receipt to be what its appearance indicated, to regard it, like a bill of lading, as embodying in one paper a receipt and a contract—a receipt as vendor that payment of purchase-money had been made, and a contract as bailee to hold the legal possession (though the manual possession was in Ripy), for the owner, whoever he might be. Taken altogether, a paper better calculated to mislead can hardly be conceived. The finding of the trial court is that plaintiff's assignors were misled by it. They parted with their money on the faith of it. They were *bona fide* purchasers. The pledge came to them "in the due course of business," and "came into the possession of the plaintiff for value, in the due course of trade, from Walker's Sons & Co." These parties had no knowledge that the goods had not been paid for, nor that real warehouse receipts were in the hands of Levy & Bro. Indeed, they had excellent reason for believing that no such receipts existed. Not only was each paper headed "Distillery Warehouse Receipt," but, at the foot was the direction: "Send this Warehouse Receipt." Would any reasonable man have assumed that Levy & Bro. had in their possession other receipts? The clause in the finding that "plaintiff purchased without knowledge or notice that defendants retained in their possession the warehouse receipts issued by Ripy, except that notice thereof was conveyed upon the so-called warehouse receipts themselves and by the statutes of the United States," is in reality a finding of law rather than fact, and is but the expression of opinion of the court that such notice was so given. But was it? The statute referred to makes no provision for the issuing of warehouse receipts. An order or permit addressed by the collector to the storekeeper is the sole formality necessary to authorize withdrawal. Not only a distiller, but an owner, can store there. To take whisky from bond the former would be required to pay the tax and obtain the necessary permit; the latter, in addition, would simply have to pay storage. So the fact, that, as indicated by the receipts, the whisky was in Ripy's warehouse, meant only that it was there held for the owner, and was notice to nobody beyond that. Ripy had been

paid for the whisky, and had no claim save for storage. Inquiry of him, therefore, would have developed only that fact—already shown by the receipt. This claim plaintiff offered to pay, as well as the tax, before bringing suit.

It is not necessary that we find a fraudulent purpose on the part of defendants—gross negligence is sufficient. That, we think, abundantly appears, and they shall not now be heard to attach new conditions. The fair inference from the language of the receipt is, that the property will be delivered to Baum & Co., or their order, upon compliance with the conditions named. If any other claim existed, it should have been stated in the receipt. To assert such a claim now, against an innocent purchaser, is bad faith, and to support it would work a fraud on the plaintiff.

The case at bar is clearly distinguishable from that of *Bank v. Walbridge*, 19 Ohio St. 419. In that case certain warehousemen (Walbridge & Co.), on application of the owner, by mistake issued to the latter, at different dates, two warehouse receipts for the same property, the last of which the owner assigned for value to the plaintiff, to whom the defendants, the warehousemen, on demand, delivered the property. Afterwards, the assignee of the first receipt recovered the property in replevin from the plaintiff, and suit was instituted by him to recover from defendants, Walbridge & Co. The court held that in the absence of all fraud, the defendants were not estopped from showing, as against the plaintiff, the mistake in the giving of the last receipt, as a defense to the action. In the opinion, White, J., uses this language: "The issuing of the receipt in this case involved no element of bad faith, but was simply a mistake of the defendant, which he was influenced to commit by the application of Lewis, whose conduct distinctly implied that no receipt had before been given for the forty-two barrels." In the case at bar there is no element of mistake, but one of gross negligence, the equivalent, in law, of bad faith and fraud. There, the receipt was issued by mistake; here, it was done intentionally, willfully.

Courts have shown extreme reluctance to permit vendors to contradict instruments of this character. A strong case in

point is that of *Chapman v. Searle, Adm'r of Whiting*, 3 Pick. 38. Whiting gave to one Ludlow a receipted bill of parcels for 300 barrels of beef, and a certificate that he held them for the latter on storage, Ludlow giving a promissory note for the amount, payable to Whiting, or order. Afterward, the note not being paid, Ludlow made an assignment to plaintiffs, as trustees for the benefit of creditors, including the beef. In trover by the assignees the court held that the defendant was estopped to say he never had any such goods; that the property vested in Ludlow, and that the defendant had no lien for the price of the goods. See, also, *Stonard v. Dunkin*, 2 Camp. 344; *Freeman v. Cooke*, *supra*, 662; *Merchants' Banking Co. v. Steel Co.*, L. R. 5 Ch. D. 205, 216, 217; *Cuming v. Brown*, 9 East. 505.

It is insisted that the receipts were to be acted on only by Baum & Co.—that the contract was exclusively between that firm and the defendants, and that where a representation is made only to one person, no other person can claim it as an estoppel. The very face of the receipts contradicts this claim. The terms imply that they may be assigned. “To be held for account of and subject to the order of G. Baum & Co.,” \* \* “this receipt properly indorsed,” is the language. The representations in this case cannot be confined to such narrow limit. On the contrary, the representations here made were of that class that are considered as addressed generally to all who may, in the ordinary course of business, have occasion to act upon them, and where a person so acting, may claim them as an estoppel. *Pence v. Arbuckle*, 22 Minn. 417; *Bigelow on Fraud*, 89, 90.

The defendants are estopped to set up a vendor's lien. Judgments below are reversed, and

*Judgment for plaintiff.*



---

Farr v. Ricker.

---

## FARR v. RICKER.

*Indorsement—Blank—Parol testimony not admissible to vary—May be reformed in equity—Proof required—Practice—Refusal to consider inconclusive evidence, not error to substantial rights.*

1. The indorsement of a negotiable promissory note, made to transfer the title to one who has purchased it for value, is, though in blank, an abbreviated contract in writing, whereby the indorser binds himself to pay the note if on presentment the maker does not, and due notice is given him of such non-payment; and, in the absence of fraud or mistake, the legal effect of such indorsement cannot be varied by parol.
2. A blank indorsement may, like any other written agreement, be reformed upon equitable principles, in an action on the indorsement, for the purpose of a defense. In such action the cause of reformation should be stated by way of cross-petition with a prayer for such relief; and the averments should be supported by clear and convincing proof, to warrant the relief.
3. Where, in an action on an indorsement, evidence is offered by the defendant in support of averments in his answer, which, if true, would make the enforcement of the indorsement operate contrary to the contemporaneous agreement of the parties and a fraud on the rights of the indorser, the liberal principles of our code would, in a trial to the court, authorize it to receive the evidence and permit an amendment of the pleadings; but where the evidence is contradictory and inconclusive, the refusal of the court to consider the evidence, is not error to the prejudice of the substantial rights of the indorser.

(Decided January 29, 1889.)

ERROR to the Circuit Court of Butler County.

*Thomas Millikin*, for plaintiff in error.

*Morey, Andrews & Morey*, and *P. C. Conklin*, for defendant in error.

MINSHALL, J. The suit below was upon the blank indorsement of a promissory note by the defendant, Ricker, to the plaintiff, Farr. The petition contains the necessary averments to show the liability of the defendant as an indorser; but among other defenses, the defendant set up that at the time he made the indorsement, there was a parol agreement between them that he was not to be liable as an indorser, in other words, that the plaintiff was to take the note without recourse. This

was denied by the plaintiff, and, a jury having been waived, the case was tried to the court, which found for the plaintiff, and, after a motion for a new trial had been made and overruled, rendered judgment for the plaintiff. The judgment was reversed, on a proceeding in error by the circuit court, on the ground, as stated in the entry, that the court held, "as incompetent, and excluded from consideration, defendant's verbal evidence, which tended to show that he wrote his name on the back of said note without recourse, or tended to show a verbal agreement between said parties, that the defendant was not to be held liable as an indorser on said note." Evidence to this effect had been introduced by the defendant, which on motion was ruled out. The note had been purchased by the plaintiff of the defendant for value in the due course of business, and the indorsement was made to transfer the title. So that the case presents the question, whether parol evidence is admissible for the purpose of varying the legal effect of such an indorsement. There has been some conflict in the decisions as to this, but it now seems that the decided weight of authority is against its admission for such purpose. Its admission has generally been placed on the ground, that the contract of indorsement is an implied one, not in writing, and so not within the rule excluding parol evidence offered for the purpose of varying, or contradicting the terms of a written agreement. But this is not the generally received opinion, and is contrary to the usage and understanding of the commercial world. It is said by Justice Matthews in *Martin v. Cole*, 104 U. S. 37: "The contract created by the indorsement and delivery of a negotiable note, even between the immediate parties to it, is a commercial contract, and is not in any proper sense a contract implied by the law, much less an inchoate or imperfect contract. It is an express contract, and is in writing, some of the terms of which, according to the custom of merchants and for the convenience of commerce, are usually omitted, but not the less on that account perfectly understood. All its terms are certain, fixed, and definite, and, when necessary, supplied by the common knowledge, based on universal custom, which has made it both safe and convenient to rest the rights and obligations of

parties to such instruments upon an abbreviation. So that the mere name of the indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full." And it was there held that parol evidence is not competent to contradict or vary the legal effect of such an indorsement; and it is also stated that the cases in support of the rule "are too numerous for citation." Regarding the indorsement, though in blank, as an abbreviated written agreement, all of whose terms are, by usage and custom, made definite and certain, such would seem to be the logical result of the previous decisions of this court. Thus it has been applied in a number of cases to the making of a note. *Titus v. Kyle*, 10 Ohio St. 444; *Collins v. Insurance Co.*, 17 Ohio St. 215; to the drawing of a bill, *Cummings v. Kent*, 44 Ohio St. 92; and, also, to the acceptance of a bill, *Robinson v. Kanawha Bank*, 44 Ohio St. 441.

There are some exceptions to the rule: It is competent to an indorser to show as against his indorsee, that they became parties to the paper, for the accommodation of the maker or some other party, though in so doing, he may change his apparent liability to his indorsee. This is illustrated by the early case of *Douglas v. Waddle*, 1 Ohio, 413, and numerous cases elsewhere, on the ground that such evidence does not vary the contract, "but, admitting its efficacy, would show how the parties had agreed to bear the burden of it if need were." Big. Lead. Cases, Bills & Notes, 169. It is also competent for an apparent indorser as against his immediate indorsee, or one with notice, to show that his indorsement was without consideration; for this is no more than may be done by a maker, drawer or acceptor under like circumstances. Or he may show that his name was placed on the paper for a different purpose, than to transfer the title to the indorsee. The case of *Morris v. Faurot*, 21 Ohio St. 155, cited and much relied on by counsel for the defendant in error, is of this class. That such was the ground of the decision, is apparent from the facts, and the language employed by the judge in delivering the opinion of the court. He says: "A blank indorse-

ment, which evidences a contract, the terms of which can not be contradicted or varied by parol testimony, is one made in the usual course of business, for the purpose of transferring the title or giving credit to the paper. The defense in this case was, that no transfer of title was intended, nor was credit intended to be given this note by the transaction, but that it was paid and discharged by the makers through and by the plaintiff, who was acting for them and at their request," and that the defendant simply indorsed his name on the note to enable the plaintiff to show the makers that he had paid it. The case of *Hudson v. Wollcott*, 39 Ohio St. 618, also falls within this distinction. The name of Burt, who was sought to be made liable as an indorser, had, for the purpose of collection by the savings bank, been indorsed on the note some months before its transfer to Hudson, and the issue was whether this indorsement had been adopted in the transfer of the note to Hudson. Burt claimed that by the agreement Hudson was to take it without recourse, and that the omission to erase the indorsement was an oversight. It was held that he might do so. *Morris v. Faurot*, is cited and relied on, which shows that the judge did not intend to announce, as the facts of the case did not require, any rule different from that applied in the former case.

A further exception is made, that is more apparent than real, in favor of the indorsee, by which he is permitted to show a parol waiver of demand and notice. The cases of *Dye v. Scott*, 35 Ohio St. 194, and the second branch of *Hudson v. Wollcott*, *supra*, are of this character; and also, *McMonigal v. Brown*, 45 Ohio St. 499. The exception is on the ground that demand and notice is not a part of the contract, but a mere step in the remedy, which may be waived by the indorser. Byl. Bills, 6th Am. Ed. Sharswood's Notes, 160; *Bassenhorst v. Wilby*, 45 Ohio St. 333, 339; 1 Par. N. & B. 584.

The limits fixed by these exceptions, confine the rule to an indorsement made for value in the usual course of business for the purpose of transferring the paper or giving it credit; and within these limits, the rule is general that a contract of

indorsement as interpreted by mercantile law, though in blank, can not be varied by parol evidence of what was then agreed on by the parties. The case of *Bailey v. Stoneman*, 41 Ohio St. 148, is claimed to be opposed to this. The indorsement sued on in that case had been made in performance of a previous contract for building a house. The builder had agreed to take the note secured by mortgage in part payment for his work. The house was built, and the indorsement then made according to the previous agreement. The plaintiff, a subsequent indorsee, knew the facts. The court held that the indorsement being in blank, parol evidence of what was said by the parties in and about the transfer was properly admitted. If this case can be construed to hold that such evidence of a parol agreement, made at the time of the indorsement for the purpose of varying its effect, is admissible, it is contrary to the subsequent case of *Cummings v. Kent*, *supra*; for it is there held that such evidence is not competent for the purpose of varying the liability of a drawer of a bill, and the drawer of a bill is, according to mercantile law, the same as the indorser of a note, or, in other words, every indorser of a note is regarded as the drawer of a new bill. And as *Cummings v. Kent* is the later case, the rule established by it should be followed until it is overruled. We are virtually asked to do so; but this we are not disposed to do, as it is supported by, not only what seems to be the better reason, but also, the greater weight of authority. Bigelow's N. & B. 178, § 3; Byl. Bills (7 Am. Ed. Sharsw.), 101 n. 1; 2 Whart. Ev. § 1059 n. 2; Benjamin's Chalmers's Dig. Art. 56; and cases cited in *Cummings v. Kent*, 44 Ohio St. at p. 97; *Castle v. Rickley*, 44 Ohio St. 490.

That an indorsement may be reformed in equity on the ground of accident, fraud, or mutual mistake, so as to make it conform to the real intention of the parties, as any other written agreement, will not admit of much doubt. In the case of *McElvain v. Merchants' & Farmers' Bank*, decided by this court at the January term, 1887, but not reported, in which the defendants below, who had been sued upon a note signed in their individual capacities, answered by way of cross-peti-

tion, that by mutual mistake the note had been so signed, when by the agreement of the parties it should have been made the note of the association of which they were directors, and asked for a reformation, it was held that the action was appealable; which, under our practice, was simply a holding that the parties were entitled to the relief they asked in case the averments were supported by proper proof. But such remedy must have been obtained, either by a suit for that purpose or by cross-petition in an action on the indorsement, before it can be relied on as a ground of defense. In such case the issue is triable to the court and must be sustained by clear and convincing proof, as in all similar cases, before the reformation can be had. This remedy affords a sufficient protection against any possible wrong that may result from the rule at law, and adequately protects the holder of negotiable paper.

There was no averment of any mistake or fraud contained in the answer, and no reformation was asked; and the evidence introduced, and not considered by the court, was insufficient to warrant a reformation, had it been asked. It consisted of the evidence of the defendant contradicted by that of the plaintiff; so that, were we, under the liberal principles of our code, to regard the answer as in the nature of a cross-petition for a reformation of the indorsement, which it is not, still the refusal of the court to consider the evidence could not be assigned as a ground of error, since, had it been considered, it would have been the duty of the court, by reason of the insufficiency of the evidence, to deny the relief; and it, alone, was the proper tribunal to consider it. Hence, in any view, there was no error to the prejudice of any substantial right of the party in the ruling of the court.

*Judgment of the circuit court reversed, and that of the common pleas affirmed.*

## COMMISSIONERS v. OSBORN ET AL.

46s 271  
48 538

*Attorney appointed to assist prosecution—Compensation—No appeal from allowance by commissioners.*

There is no appeal from the amount allowed by the commissioners to an attorney appointed by the court to assist the prosecution in a criminal case.

(Decided February 5, 1889.)

## ERROR to the Circuit Court of Geauga County.

BY THE COURT. The defendants in error, attorneys-at-law, were appointed by the Court of Common Pleas of Geauga County to assist the state in the prosecution of an indictment found by the grand jury; and, at the termination of the prosecution, were allowed by the court for their services rendered under the appointment, the sum of \$800; this sum, on presentation of the claim to the commissioners, was reduced by them to the sum of \$300, in the exercise of the power conferred on them by the provisions of § 7196, Revised Statutes, to the effect that the compensation to be paid an attorney for services so rendered, should be such sum "as the court approves, and to them (the commissioners) seems just and proper." From this allowance as made by the commissioners, the attorneys appealed to the court of common pleas. A motion was made by the commissioners to dismiss the appeal on the ground that the case was not appealable, and that the court, for such reason, had no jurisdiction. The motion was overruled and judgment rendered for the sum of \$800 and interest; which judgment was on error affirmed by the circuit court.

*Held*, that no appeal lies from the final allowance made by the commissioners for services rendered by an attorney in such case. We can see no difference in principle between an allowance made to an attorney appointed to assist the prosecution, and that of an allowance to one appointed to defend the accused; and as it was held in *Commissioners of Geauga County v. Ranney*, 13 Ohio St. 388, that there is no appeal from the

---

Rutter v. Henry.

---

allowance made an attorney appointed to defend, like reasons require us to hold that there is no appeal from the allowance made by the commissioners to an attorney appointed to assist the prosecution. The power reposed in the commissioners is discretionary and final. The case of *Shepard v. Commissioners of Darke County*, 8 Ohio St. 354, did not present the question whether an appeal would lie or not. It was an original suit brought in the common pleas on a claim that had been presented to, and passed on by the commissioners. The court held that the action would not lie; and this would have been so whether there was an appeal from the action of the commissioners, as said by the court, or not, on the principle of the later case of *Commissioners v. Ranney*. In any event, the latter case is not only the later one, but is more in point, and governs, as we think, the decision of the case under review. For these reasons, we think the court of common pleas erred in not dismissing the appeal, and the circuit court erred in affirming its judgment.

*The judgments of the common pleas and that of the circuit court are reversed, and the appeal dismissed.*

---

RUTTER v. HENRY.

*Animals—Running at large—Sections 4202, 4207 and 4208 construed—Pleadings.*

1. Where, without the fault of the owner, a horse passes from such owner's inclosure over or through a line fence into the inclosure of an adjoining proprietor, and thence through a gap in a fence into the inclosure of another and adjacent proprietor, he is not running at large contrary to the provisions of section 4202 (Rev. Stats.); and no person is authorized to take up and confine him until the owner pay or tender compensation or other charges, as provided by sections 4207 and 4208 (Rev. Stats.)
2. An allegation that such animal was "unlawfully running at large," with no further statement of the facts, is not a sufficient averment that it was running at large in violation of the provisions of said section 4202.

(Decided February 5, 1889.)

ERROR to the Circuit Court of Washington County.



The original action was one in replevin brought by the plaintiff to recover a horse from the defendant. The plaintiff alleged in his petition, in the usual form, his ownership of the horse, his right to the immediate possession of it, and its unlawful detention from him by the defendant. The latter answered, denying the unlawful detention simply, and "for further answer and cross-petition" alleged that the horse was unlawfully running at large; that the defendant being the owner of land in the same township, took him up when so found running unlawfully at large, and confined him, and gave notice thereof to plaintiff the same day; that plaintiff refused to pay the statutory charges for taking up, and reasonable compensation for keeping the horse, wherefore he detained him as he lawfully might do. That he was entitled to \$1.00 for taking the horse up, and reasonable compensation for keeping him two days, \$1.50, for which, with \$10.00 damages, he prays judgment. Replying, the plaintiff says "that the said horse was not at large with his knowledge or by his fault."

Upon these issues the action proceeded to trial to a jury. The plaintiff gave evidence tending to show that the horse when taken up by the defendant was not running at large, nor caused to be detained for purposes of grazing in or upon any of the places specified in section 4202, Rev. Stats. That without his fault the horse passed from his inclosure through or over a line fence into an adjoining inclosure, and then through a gap into defendant's field, where the latter took him up, notified the plaintiff, and demanded the payment of \$1.00 "damages" as a condition of delivering him up to the plaintiff; that the plaintiff made no tender of \$1.00 or any other sum, but stated that he was ready to pay what was right; that only nominal damage was committed by the horse. Thereupon the plaintiff rested his case, when the court, on motion of defendant, arrested the case from the jury and gave judgment for defendant, upon the ground and for the reason that there was no evidence tending to prove a payment or tender of any sum of money by plaintiff to defendant, as compensation for taking up the horse. This action is assigned for error.

---

Rutter v. Henry.

---

This judgment was affirmed on error by the circuit court, and it is to reverse these judgments that this proceeding is prosecuted.

OWEN, C. J. The case should have been submitted to the jury. The horse was not, when taken up by the defendant, running at large in any public road or highway, or in any street, lane or alley, or upon any uninclosed land, or caused to be detained for grazing upon any of the places pointed out in section 4202, Rev. Stats., and hence no person was authorized to detain him until either damages or compensation should be paid or tendered by the owner. It was wholly without his fault or knowledge that the horse found his way into the defendant's inclosure. He did not suffer him to run at large in any sense contemplated by the statute, and consequently the case was not brought within either section 4207 or 4208, Rev. Stats.

Nor is it enough to bring the case within the statute that the animal taken up was "running at large." It must have been so at large in one of the places and conditions defined in the statute. It is assumed by counsel for defendant that the plaintiff admitted, by not denying, that the horse was "unlawfully running at large," as it is alleged in the answer. This view magnifies the legal significance of this averment. It means no more than that the horse was running at large—whatever that is. The meaning is not enlarged by the epithet employed. It involves no issuable fact. Whether it was unlawfully running at large depends upon the facts, and these are not stated.

It was incumbent upon the defendant to show, if the plaintiff's evidence did not, that the horse was suffered by the plaintiff to run at large, or caused by him to be detained for grazing upon some place specified in section 4202. This is not accomplished by an undenied averment that the horse was "unlawfully running at large." The facts should have been shown so that the court could say whether they brought the case within the statute. Beyond the fact that the horse was "at large," the averment is of the mere conclusion of the

State ex rel. Attorney-General v. Shearer et al.

pleader. The reply avers that the horse was not at large with plaintiff's knowledge or by his fault. Besides, it may well be said, that all averments beyond the denial of defendant of the unlawful detention, were surplusage and immaterial. This denial made an issue as broad as the entire case. Every material fact was put in issue by it. *Bailey v. Swaine*, 45 Ohio St. 657.

The assumption that the plaintiff admitted the case to be within sections 4202, 4207 and 4208, being unfounded, there is nothing in the record that tends even to bring the case within any of these provisions; and as, therefore, no case calling for a tender was made, the trial court erred in arresting the case from the jury and giving judgment for the defendant by reason of the failure of the plaintiff to prove such tender, and for this error the

*Judgments below are reversed and the cause remanded for further proceedings.*

# STATE EX REL. ATTORNEY-GENERAL v. SHEARER ET AL.

*Special school districts—When law creating, not of a general nature—Section 26 of article 2, of the constitution, construed.*

1. A law is not necessarily of a general nature by reason simply of its being upon a general subject.
2. Special legislation upon a subject-matter in its nature local, is not prohibited by section 26 of article 2, of the constitution, which provides that "all laws of a general nature shall have a uniform operation throughout the state," notwithstanding the subject-matter is the subject of a general law.
3. The subject of dividing territory into school districts, is, in its nature, local.

Hence, the formation of a special school district from territory within the limits of a township, by special act, is not in conflict with section 26 of article 2, of the constitution. *The State v. Powers*, 38 Ohio St. 54, overruled.

(Decided February 5, 1889.)

## QUO WARRANTO.

The proceeding is instituted for the purpose of ousting the defendants from the exercise of the duties and functions of a

46	27
47	9
46	27
49	58
46	27
50	11
46	27
54	29
46	27
55	63
46	27
67	8
67	8
67	8

---

*State ex rel. Attorney-General v. Shearer et al.*

---

board of education. They justify under an act of the general assembly passed April 14, 1888, (85 Ohio L. 541), entitled "an act to establish a special school district in Osnaburg township, Stark county, Ohio."

The first section of the act describes the territory embraced within the special school district, which is to be called "Mapleton Special School District." The second section provides that the special district "shall be entitled to receive its proportionate share of school funds levied for incidental expenses, in accordance with the enumeration of the year 1887, of school children entitled to attend school; said funds being those now collected within the township or county treasuries, and shall be governed by such laws as now are, or may hereafter be, in force in relation to special school districts."

*David K. Watson*, attorney-general, for relator.

*Baldwin & Shields*, for defendants.

SPEAR, J. The single ground for ouster is that the act constituting this special district is void in that it contravenes sec. 26 of article 2, of the constitution, which is: "All laws of a general nature shall have a uniform operation throughout the state."

If this objection is made clearly to appear, then it is the duty of the court to so pronounce, and to grant the prayer of the petition. But if any doubt exists, it is the duty of the court to uphold the act.

+ The precise question is: Is this act one of a general nature; or is it, on the other hand, a local enactment? That it is competent for the general assembly to pass local and special laws, is not questioned, nor is it believed that that body may not pass local laws in regard to subjects upon which it has already passed a general law. As to certain subjects, other clauses of the constitution prohibit the passage of special acts, but the subject of schools is not one. Nor does it follow that a law which is local and special in the object to be accomplished, and in the form it has been made to assume, must be declared a general statute merely because the same result

might have been reached by means of a general law. And, although a law be upon a general subject, it is not necessarily, a law of a general nature. The subject may be general while the purpose of the act may be special and local.

Of this character was the act brought in review in *The State v. The Judges*, 21 Ohio St. 1. The purpose of the act was to limit the compensation of the county treasurer, auditor, recorder, sheriff, probate judge and clerk of the county of Hamilton, and to have fixed by the judges of the court of common pleas of that county, the compensation of all deputies, clerks, etc., employed by those officers. The matter of fees to be paid county officers had been, long before, made the subject of a general statute which fixed fees for those officers throughout the state, and the subject was clearly a general one, yet this court held that the act in question was not a law of a general nature, but was intended to provide for a condition of things in its nature local to that county.

Of like character was an act passed March 24, 1876, the purpose of which was to regulate the police force in the city of Cincinnati, through a board of police commissioners, to be appointed by the governor. The constitutionality of the act was considered in *Ohio v. Covington*, 29 Ohio St. 102. This court held the act to be local and special in its nature, and therefore not in conflict with section 26 of article 2, of the constitution, although all the matters embraced were subjects of legislation by general law.

In *McGill v. The State*, 34 Ohio St. 228, this court reviewed the act of May 7, 1877, prescribing the manner of selecting juries in Cuyahoga county. It was not doubted that the matter of the selection of juries was a general subject in which the people of the state at large were interested, and that, since the organization of the state, it had been provided for by general laws; so that the law which provided a special mode of selecting juries in that county, was one treating of a general subject already embraced in general laws, making provisions applicable to all counties of the state, yet this court held that the act was not a law of a general nature, requiring uniformity of operation throughout the state, but that it was designed

to meet a special want in a particular county, and was not in conflict with the constitution.

It follows that if the act in question in this case can, consistent with the subject-matter and the provisions of the act itself, reasonably be regarded as one local in its nature, rather than general, the court's duty to maintain it is clear. Nay, unless it clearly appears that it is general in its nature, and not local, it must be sustained. The form of the act, and the manner of its publication, show that it was intended as a special, local law, and we are to conclude that, in the judgment of the general assembly, there was sufficient reason, in the condition of things existing within the territory affected, to warrant provisions by special law. This special district is composed of territory of Osnaburg township, the territory of which, as we gather from the record, theretofore comprised one township district. The change contemplated by this enactment, was to create in that township a special district, the schools in which were to be controlled by a board of education, as schools in other special districts are.

In the general laws upon the subject of schools we find that section 3890 of the Revised Statutes, which in terms provides for township districts, also recognizes that a portion of a township may be a special district, and provision is made elsewhere in the statute for constituting such special districts. Sub-districts and joint sub-districts, are also provided for, and provision for consolidation of these districts is made. The idea pervading the statute, as to this feature is, that the needs of the people of the different townships will be different; that, while in one the education of the youth may be reasonably attained by constituting the whole territory into one district, in an adjoining township the same object can be better attained by dividing the territory into sub-districts, or by carving out of the territory of the township a portion into a special district, or, by reason of changed conditions, by the consolidation of sub-districts. This implies that the question of whether territory in a given locality shall be formed into one kind of a district, or another, will be determined by considerations of local convenience, and that no division by a

rule which shall be fixed, arbitrary, and uniform, will meet the requirements of all sections. It is foreseen that changes will be necessary from time to time, and power is given to boards of education to initiate such changes, and the same may be brought about in any of the several localities without reference to or disturbance of, neighboring districts not geographically affected, or the schools within them. Clearly, then, in the judgment of the framers of the general law, divisions of territory into districts, is a matter of local concern, and this policy has obtained from a time long anterior to the adoption of the present constitution. And that it has been the policy since is evidenced not only by the terms of the general law, but by the passage of more than one hundred and forty special acts creating and changing the boundaries of school districts.

The case of *The State v. Powers*, 38 Ohio St. 54, is cited as an authority controlling this case, and, if followed, it is probable that the relator's contention must be sustained. It may not be out of place, however, to note a distinction between the enactment under review in that case, and the one we are considering. The defendants, Powers and others, assumed to act as a board of education of a special school district comprising an entire township, and created by consolidation of a village district within the township, with the remainder of the territory, which theretofore had comprised a township district; and the board was to be chosen, two from the territory comprising the village district, two from that comprising the township district, and two from the township at large. In the opinion, special emphasis is laid upon the fact that under the general law there is no authority for extending the government of village districts over the sub-districts of townships, or for consolidating village and township districts, in the manner provided in the special act, nor authority for organizing a board of education as therein provided. Without stopping to discuss the importance of this objection, attention is called to the fact that the act under review is open to no like objections, as it undertakes simply to do directly, by special act, what by the general statute, may be done in an-

other way, viz.: create a special school district within the territory of a township, leaving the remainder of the territory to continue as a township district.

But we do not incline to rest a decision of the case upon this distinction, and frankness requires that we consider the holding in the case cited, as to its other features. The opinion gives prominence to the clause of section 7, of article 1, of the constitution, which makes it "the duty of the general assembly to pass suitable laws to encourage schools, and the means of instruction," and of section 2, of article 6, which requires that body to "make such provision, by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state," and draws the inference "that the subject of common schools is thus declared to be one of a general nature." "These schools," continues the opinion, "are sustained in part by a trust fund, in which every section, as well as every individual of the state, has a common interest. This is not all; the interest of every section and every individual is to be secured by a thorough and efficient *system* of schools, and, as if it were to guard against such special and local legislation as we find in this statute, it is expressly declared that such system shall extend 'throughout the state.'"

It may be conceded that the subject of common schools is one of a general nature. But does it, therefore, follow that everything that relates to common schools must be provided for by a general law? Obviously this would be impracticable. Nor is it apparent that the right of every section and of every individual to enjoy the benefit of the trust fund is more affected by a change of districts caused by a special law than by one brought about by means authorized by a general law. We agree that the trust fund is for the benefit of those who are to be educated. Hence, it is the duty of the general assembly, in obedience to the mandate of the constitution, to make such provision as will give the best attainable opportunity to the student for availing himself of the advantages secured by the fund thus created. If, in the judgment of the general assembly, this can be better done by special legislation with respect



to the division of particular territory, than by a general rule, it is difficult to see that such special provision is inconsistent with the spirit of the requirement, or that it interferes with the general design for providing means for instruction. The means by which territory may be divided into districts does not seem to inhere in the idea of a "system of schools;" it does not belong, as an attribute or quality, of such "system." Nor can we perceive that the forming of a special school district, as in this act provided, interferes with the working of the "system of common schools." Except the discussion in the opinion we are considering, this clause has not, so far as we are aware, received judicial notice or construction, and it is, perhaps, not necessary to attempt extended construction here. We may, however, with propriety, venture the suggestion that the "system" provided for does not necessarily imply a fixed territorial division into districts. A "system" might be established by general rules fixing the character and grading of the schools, the scope of the education intended to be given, the character of the officers who shall control, and the powers with which they shall be clothed, together with suitable provision for raising the necessary means to meet the general expenses, and for an equitable division of the funds so procured. These are general features, capable of being reasonably made uniform throughout the state, while the question of division of territory, like that of the erection of school houses, and the procuring of apparatus and other property necessary for the use of the schools, would seem to be so far of local concern merely that special necessities might safely be left to be provided for by special enactments. The kind of school that shall be maintained, and the character of the education which may be received, are of general common concern, to be made uniform in order that the youth of the state may, as far as practicable, be enabled to receive equal benefit from the trust fund and from the "system" established, while the precise place where these opportunities shall be afforded are, in their nature, local and transitory, and as to them it would appear not to be necessary to control them absolutely by a rule which would be uniform in its operation throughout the state.

---

State *ex rel.* Attorney-General v. Shearer *et al.*

---

Upon the general subject here discussed, some light is thrown by the decisions of other states. The constitution of the state of California has a provision (section 11, of article 2), identical with section 26 of article 2 of our constitution. In *People v. Railroad Co.*, 43 Cal. 398, the court gives a construction to the clause referred to in consonance with the views hereinbefore expressed, and distinctly holds that "whether a law is of a general or special nature depends, in a measure, upon the legislative purpose discoverable in its enactment," and "that the constitution does not prohibit a special act, because the subject with which it deals might have been the subject of a general law."

The constitution of the state of Kansas (section 17 of article 2), has a like provision, which is construed in *The State v. Hitchcock*, 1 Kansas, 178, and in *Beach v. Leahy, Treas.*, 11 Kansas, 23. See also, *Gentile v. The State*, 29 Indiana, 409; *The State v. Tucker*, 46 Indiana, 355; *The State v. Court of Boone Co.*, 50 Missouri, 317; *The State v. Court of New Madrid*, 51 Missouri, 83, and *Commissioners v. Shields*, 62 Missouri, 247. See also, *Ruffner v. Commissioners*, 1 Disney, 196.

The decision in *The State v. Powers*, *supra*, was made by a majority of the court, two of the judges dissenting. For the judgment of the concurring judges (as well as for that of their equally learned associates who did not concur,) we entertain the very highest respect, and it is with great reluctance that we feel compelled to announce a conclusion not in harmony with their decision. But we are of opinion that the case was not correctly decided, and inasmuch as a large number of school districts in the state have been formed by local enactments similar to the one under review here, and are now existing by virtue of the authority thus given, we feel it our duty to pronounce the law as we believe it to be; especially as it is not apparent that any practical inconvenience will result from such course.

Our conclusion is that the act in question is not clearly in conflict with the constitution, and that the prayer of the petition should be refused.

*Petition dismissed.*

## ROLLING MILL CO. v. CORRIGAN.

*Contributory negligence—Application of the doctrine to children—What is “ordinary care,” when applied to infants—Degree of care required of them—Duties of employers to infant employes—What does not amount to contributory negligence on the part of the latter.*

1. In the application of the doctrine of contributory negligence to children, in actions by them, or in their behalf, for injuries occasioned by the negligence of others, their conduct should not be judged by the same rule which governs that of adults; and while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them, is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances.
2. Persons who employ children to work with, or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion and care as is usual among children of the same age, under similar circumstances, and are bound to use due care, having regard to their age, and inexperience, to protect them from dangers incident to the situation in which they are placed; and as a reasonable precaution, in the exercise of such care in that behalf, it is the duty of the employer, to so instruct such employes concerning the dangers connected with their employment, which, from their youth and inexperience they may not appreciate or comprehend, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom.
3. Such employe, who has not been so instructed, and who, while in the discharge of his duty as he understands it, suffers an injury in consequence of the employer's negligence, may maintain an action against the employer therefor, notwithstanding, that, by reason of his youth and inexperience, and the failure of the employer to properly instruct him, he did some act, in the performance of his duty according to the judgment and knowledge he possessed, which contributed to the injury, but which he did not know, and was not advised, would be likely to injure him.

(Decided February 26, 1889)

**ERROR** to the Circuit Court of Cuyahoga County.

The plaintiff below, John Corrigan, an infant under the age of fourteen years, by his guardian Thomas Corrigan, commenced his action in the Court of Common Pleas of Cuyahoga County, against The Cleveland Rolling Mill Company, to recover damages for a personal injury, which he suffered while em-

46	283
53	283
46	283
54	192
46	283
87	68

ployed by the company in its mill, and which, he charges was caused by the company's negligence. His petition, after stating the appointment of the guardian, the incorporation of the defendant, and that in his employment he was placed by the defendant, under the control and direction of its foreman, alleges that he was "by the defendant, through its foreman, negligently and carelessly placed in a very dangerous and hazardous place and position, and then and there, by the defendant carelessly and negligently ordered and directed to engage in a very hazardous undertaking and business; that is to say, the plaintiff was so ordered, put and placed by the defendant, carelessly and negligently as aforesaid, at defendant's rolling mill in a narrow and limited space in dangerous and hazardous proximity to dangerous moving and complicated machinery, revolving wheels and shafts, on one of which shafts a long loose belt was by the defendant carelessly and negligently suffered and allowed to be, become and continue hanging and swinging in irregular motions and movements, effected by the revolution and revolving motion of the said shaft on which it was so hanging; and by the defendant, through its said foreman, carelessly and negligently, plaintiff was ordered, required and directed to then and there turn the steam engines of the defendant on and off so as to start, stop and regulate the motion of the same, in order to do which, plaintiff had to reach up above his head to turn the stop valve or faucet there being, and so effect the purpose aforesaid, under and in obedience to said orders and directions. And plaintiff says that in so doing, and in order thereto, it became and was necessary for him to stand in dangerous proximity to said revolving shaft on which said belt was so hanging and moving, and in dangerous proximity to said belt, so that said place, business, situation and circumstances then and there attending the execution of said order and direction so given and made as aforesaid, as well as the execution thereof, was extremely dangerous and hazardous to him, the plaintiff, the defendant well knowing and being in duty bound to know the same; while the plaintiff, by reason of his extreme youth, tender years and inexperience, had not the opportunity nor capacity to in-

spect the situation, nor in any degree to apprehend, understand or comprehend the premises, danger or dangerous nature of the situation aforesaid, and was ignorant thereof, which the defendant well knew, and was in duty bound to know; and while the plaintiff was executing said order and direction given by the defendant, and in obedience thereto (the defendant having carelessly and negligently neglected to advise or caution the plaintiff in the premises or any part thereof,) and while the attention of the plaintiff was so necessarily engaged in said business, acting in obedience to said order and direction, and without any fault on his part, but by and through the negligence of the defendant, and by reason thereof, the left foot, limb and leg of the plaintiff were unavoidably caught in said belt, and thereby turned to and brought against said revolving shaft last named, and run over and turned around the same, under and by said belt and revolving shaft, and so the bones and the flesh thereof crushed, mangled and broken many times from his foot to his knee, and the plaintiff shocked, strained and injured in his body and limbs, so that the plaintiff became and was by reason thereof, a long time sick, sore, lame and diseased, his said limb necessarily had to be and was amputated, the plaintiff permanently injured and crippled for life, put to great suffering and anguish, was compelled to suffer and has suffered the expense of ——— dollars in trying to cure himself, and is otherwise injured, to his damage in the sum of ten thousand dollars."

The answer admits that the plaintiff was by the defendant placed under the control of its foreman, by whom the plaintiff "was directed to attend to the turning on and off of the steam at a steam engine of defendant's, so as to start and stop it, in order to do which he had to reach up and turn the stop valve or faucet; and that he was so engaged on the day of receiving said injury; that in performance of said duty it was necessary for him to stand near a shaft of said engine, which revolved when the engine was in motion, and that at the time the injury occurred a short belt was hanging loose upon said shaft; that his leg was crushed by said shaft so that it had to be amputated."

---

Rolling Mill Co. v. Corrigan.

---

The answer denies the other allegations of the petition, and avers that "the injury to John Corrigan occurred solely through his own fault and negligence, and without any fault, negligence or want of due care on defendant's part."

The cause was tried to a jury, and the only exceptions taken in the progress of the case, as disclosed by the record, appear therein as follows :

"And the jury thereupon (on December 15, 1886,) retired, and afterwards (on December 17, 1886,) came into court and stated that they had not agreed, and requested further instruction from the court, and made their request in writing as follows :

"If we find that the defendant did not use that care, caution and judgment that their relations to the plaintiff required in placing the plaintiff in a position that resulted in his injury, and that the boy contributed thereto ignorantly, then can we find for the plaintiff?

"The Court. I will say to you upon this subject, gentlemen, it was the duty of the plaintiff to use ordinary care and prudence; just such care and prudence as a boy of his age, of ordinary care and prudence, would use under like or similar circumstances. You should take into consideration his age, the judgment and knowledge he possessed. If not understanding all the dangers and hazards of the situation in which he was placed by the foreman, and you find it was a dangerous and hazardous situation in which to place a boy of his age, judgment and experience, it was the duty of the foreman to instruct him in respect thereto, that he might conduct himself so as to guard against such peril; and if he was injured by reason of the neglect or carelessness of the defendant, and John Corrigan, by reason of his youth and want of judgment as to the perils of the position, did some act in the discharge of his duty as he understood it, which also contributed to the injury, and which he did not know to be likely to injure him, and had not been properly advised and instructed thereto by the foreman, he is entitled to recover.

"And thereupon defendant excepted to the charge given to the jury on the occasion of their return into court asking fur-

ther instructions as aforesaid. And thereupon the jury retired, and afterwards returned a verdict for plaintiff, and assessed his damages at \$5,000.00; and thereupon defendant filed its motion for a new trial of this cause, which motion the court on consideration overruled; to which overruling of said motion, the defendant thereupon excepted."

Judgment having been rendered on the verdict, and affirmed by the circuit court, the Rolling Mill Company filed its petition in error in this court to reverse both judgments.

*Williamson, Beach & Cushing*, for plaintiff in error.

The court erred in the statement of the duty resting on the plaintiff, and in instructing the jury that defendant's duty toward plaintiff should be measured by the amount of judgment which plaintiff actually possessed. *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Fones v. Phillips*, 39 Ark. 17; 26 Am. Law Reg. 737; It was error to leave to the jury to decide whether Corrigan's act, which contributed to his injury, was done by him, "in the discharge of his duty, as he understood it." *Breese v. State*, 12 Ohio St. 155; *Bain v. Wilson*, 10 Ohio St. 15. The answer of the court to the question of the jury was wrong and misleading, because it left it to the jury as an open question, whether Corrigan did or did not know his contributing act to be likely to injure him. *Ciriack v. Woolen Co.*, 148 Mass. 182; *Nagle v. Railroad*, 88 Pa. St. 30; *Achtenhagen v. Watertown*, 18 Wis. 332; *Connell v. Miller*, 19 Law Bull. 22.

*Robison & Rogers*, for defendant in error.

If defendant knew, or had reason to apprehend special dangers from his acts or omissions, or had greater capacity for understanding the harmful results likely to flow from his conduct than the injured person had, he will be liable, notwithstanding acts or omissions on the part of the injured person, that with equal knowledge of the danger, or capacity to comprehend it would have been contributory negligence. 4 Am. & Eng. Ency. p. 40, par. 19, and cases there cited; *Railroad v. Fitzpatrick*, 31 Ohio St. 479. And he may recover for in-

juries resulting from dangers that, by reason of youth, immaturity and inexperience, he was unable fully to apprehend, and the perils of which had not been explained to him. *Railway Co. v. Whipple*, 18 Pac. Rep. 730; *Baker v. Railway*, 35 N. W. Rep. 836; *W. & A. R. Co. v. Young*, 7 S. E. Rep. 912; *Coombs v. Cordage Co.*, 102 Mass. 572; *Glover v. Dwight Mfg. Co.*, 18 N. E. Rep. 597; *Atkins v. Merrick Thread Co.*, 142 Mass. 431; *Jones v. Mining Co.*, 66 Wis. 268; *Whitelaw v. Railway*, 16 Lea. (Tenn.) 391; *McGowen v. La Plata Co.*, 9 Fed. Rep. 861; Wood on Master & Servant, secs. 349-50.

WILLIAMS, J. The only questions presented in this case, are those arising upon the special instructions given by the court in response to the request of the jury. These instructions, the plaintiff in error contends, are erroneous in their entirety, and in detail.

1. First, it is claimed that the court erred in the statement of the plaintiff's duty, in the opening proposition of the charge, wherein the jury were instructed that "it was the duty of the plaintiff to use ordinary care," which the court defined to be, "just such care as boys of that age, of ordinary care and prudence, would use under like circumstances," and that the jury "should take into consideration the age of the plaintiff, and the judgment and knowledge he possessed." We have found no decision of this court upon the subject of the contributory negligence of infants, or the measure of care required of them. Elsewhere the decisions are conflicting. Each of three different rules on the subject, has found judicial sanction. One rule requires of children, the same standard of care, judgment and discretion, in anticipating and avoiding injury, as adults are bound to exercise. Another wholly exempts small children from the doctrine of contributory negligence. Between these extremes, a third, and more reasonable rule, has grown into favor, and is now supported by the great weight of authority, which is, that a child is held to no greater care, than is usually possessed by children of the same age. Authors and judges, however, do not al-



ways employ the same language in giving expression to the rule. In Beach on Contributory Negligence, sec. 46, it is thus expressed: "An infant plaintiff, who, on the one hand, is not so young as to escape entirely all legal accountability, and on the other hand, is not so mature as to be held to the responsibility of an adult, is, of course, in cases involving the question of negligence, to be held responsible for ordinary care, and ordinary care must mean, in this connection, that degree of care and prudence which may reasonably be expected of a child." The decisions enforcing this rule, that children are to be held responsible only for such degree of care and prudence as may reasonably be expected of them, taking due account of their age and the particular circumstances, are very numerous. "It is well settled," says Mr. Justice Hunt in *Railroad Company v. Stout*, 17 Wal. 657, "that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. \* \* \*

The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case, by the circumstances of that case." In *Sherman & Redfield on Negligence*, sec. 73, it is said to be "now settled by the overwhelming weight of authority that a child is held, as far as he is personally concerned, only to the exercise of such care and discretion, as is reasonably to be expected from children of his own age." Another author says, "a child is only bound to exercise such a degree of care as children of his particular age may be presumed capable of exercising." Whittaker's *Smith on Neg.* 411.

This rule appears to rest upon sound reason as well as authority. To constitute contributory negligence in any case, there must be a want of ordinary care, and a proximate connection between such want of care and the injury complained of; and ordinary care, is that degree of care, which persons of ordinary care and prudence, are accustomed to use under similar circumstances. Children constitute a class of persons of less discretion and judgment than adults, of which all reasonably informed men are aware. Hence ordinarily prudent men,

reasonably expect that children will exercise only the care and prudence of children, and no greater degree of care should be required of them than is usual under the circumstances, among careful and prudent persons of the class to which they belong. We think it a sound rule, therefore, that in the application of the doctrine of contributory negligence to children, in actions by them or in their behalf for injuries occasioned by the negligence of others, their conduct should not be judged by the same rule which governs that of adults, and, while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them, is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise, under similar circumstances.

That portion of the charge of the court under discussion, is in substantial conformity to this conclusion. The care and prudence which a boy of the plaintiff's age of ordinary care and prudence "would use under like and similar circumstances," as expressed in the charge, is such care as "is reasonably to be expected from a boy of his age," or "which boys of his age usually exercise," as the books express it. No different effect is given to the charge, of which the plaintiff in error can complain, by the direction to the jury, to take into consideration, the age of the boy "and the judgment and knowledge he possessed." This did not diminish the degree of care required by the previous portion of the instruction.

2. It is next insisted, that the court erred in charging the jury, that it was the duty of the defendant's foreman to instruct the plaintiff in regard to the dangers of his employment. The paragraph of the charge is as follows:

"If not understanding all the dangers and hazards of the situation in which he was placed by the foreman, and you find it was a dangerous and hazardous situation in which to place a boy of his age, judgment and experience, it was the duty of the foreman to instruct him in respect thereto, that he might conduct himself so as to guard against such peril."

This portion of the charge was pertinent to the case. The answer admits that the plaintiff, at the time of his injury, was employed by the defendant in the rolling mill, and placed un-

der the control of its foreman, who directed him to attend to the turning on and off of the steam at the steam engine; to do which, he had to stand near a shaft of the engine, which revolved when the engine was in motion, and reach up to turn the stop-valve, which was necessary to put the machinery in motion, or stop it. It further admits, that, at the time the injury occurred, a belt was hanging loose upon the shaft, and that the plaintiff's leg was crushed by the shaft. It was shown by the evidence, that the plaintiff was less than fourteen years of age, and had been engaged at that employment but a few days; and that he was placed there by the foreman in the midst of rapidly moving and noisy machinery; that his employment required his constant attention to regulate the speed of the machinery, and that the belt, which hung suspended on the shaft near him, was given such motion by the shaft, that it would come near him and in close proximity to his face; and while the machinery was in motion, the plaintiff's foot in some way became entangled in the hanging belt, by which means the injury was produced. There was also evidence tending to prove the other allegations of the plaintiff's petition. The defendant's foreman, who placed the plaintiff in the position where he received his injury, must have known of the loose hanging belt on the shaft, which could easily have been removed in a few moments and without expense. It is evident that he knew the situation in which he placed the plaintiff, was one of danger, which he might, with a small amount of trouble on his part, have pointed out and explained to the plaintiff.

The almost universally accepted doctrine is, that the care to be observed to avoid injuries to children, is greater than that in respect to adults. That course of conduct, which would be ordinary care when applied to persons of mature judgment and discretion, might be gross, and even criminal negligence, toward children of tender years. The same discernment and foresight, in discovering defects and dangers, can not be reasonably expected of them, that older and experienced persons habitually employ; and therefore the

greater precaution should be taken, where children are exposed to them.

Judge Cooley in his work on Torts, (p. 652), says on this subject :

“The master may also be guilty of actionable negligence in exposing persons to perils in his service which, though open to observation, they, by reason of their youth or inexperience, do not fully understand and appreciate, and in consequence of which they are injured. Such cases occur most frequently in the employment of infants. It has been repeatedly held that the case of an infant is no exception to the general rule which exempts the master from responsibility for injuries arising from the hazards of his service. But while this is unquestionably true as a rule, it would be gross injustice, not to say absurdity, to apply in the case of infants the same tests of the master’s culpable negligence which are applied in the case of persons of maturity and experience. It may be ordinary caution in one case to apprise the servant of the danger he must guard against, while in the case of another, not yet beyond the years of thoughtless childhood, it would be gross and most culpable, if not criminal, carelessness for the master to content himself with pointing out dangers which were not likely to be appreciated, or if appreciated, not likely to be kept with sufficient distinctness and caution in mind, and against which, therefore, effectual protections ought to be provided. The duty of the employer to take special precautions in such cases, has sometimes been very emphatically asserted by the courts.”

The law “puts upon a master, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business, and of instructing him how to avoid them. Nor is this all; the master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance, and inexperience of the servant as to make him fully aware of the danger to him, and to place him, with reference to it, in substantially the same situation as if he were an adult. If the master, or his vice-principal, orders the infant servant to perform a duty in a manner attended with peculiar hazard, and

the servant is injured while so doing, the liability of the master is not an open question." Thompson on Neg. 978.

In *Sullivan v. India Manufacturing Co.*, 113 Mass. 396, it is said that, "It may frequently happen that the dangers of a particular position for, or mode of doing work, are great, and apparent to persons of capacity and knowledge of the subject, and yet a party from youth, inexperience, ignorance, or general want of capacity may fail to appreciate them. It would be a breach of duty on the part of a master to expose a servant of this character, even with his own consent, to such dangers, unless with instructions or cautions sufficient to enable him to comprehend them, and to do his work safely, with proper care on his own part."

It is distinctly held in *Whitelaw v. Railroad Company*, 16 Tenn. 391, that it is the duty of the master, to give such warning, advice and "instructions to a youthful and inexperienced employe as would enable him, with the exercise of ordinary care, to perform the duties of his employment with safety to himself." See also, *Jones v. Florence Mining Co.*, 66 Wis. 268.

It may be safely laid down as a general rule, supported by authority, that persons, who employ children to work with, or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion and care, as is usual among children of the same age, under similar circumstances, and are bound to use due care, having regard to their age and inexperience, to protect them from the dangers incident to the situation in which they are placed; and as a reasonable precaution, in the exercise of such care in that behalf, it is the duty of the employer, to so instruct such employes, concerning the dangers connected with their employment, which, from their youth and inexperience they may not appreciate or comprehend, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom.

3. It is finally urged that there was error in that portion of the charge, by which the jury were instructed that if the plaintiff was injured in consequence of the defendant's negligence, and he, "by reason of his youth, and want of judg-

ment as to the perils of his position, did some act in the discharge of his duty as he understood it, which also contributed to his injury, but which he did not know to be likely to injure him, and he had not been properly advised and instructed in regard thereto," he could recover.

It is first insisted, that the court, having informed the jury in what event the plaintiff was entitled to recover, they should also have been instructed under what circumstances the defendant would be entitled to the verdict. But since the attention of the court does not appear to have been called to this oversight, if it be one, and no request was made by counsel for such instruction, if the charge given is otherwise unobjectionable, the mere omission to give the further instruction referred to, is not sufficient ground for reversing the judgment.

This proposition of the charge is sustained by the authorities already cited, and is clearly within the doctrine of *Coombs v. New Bedford Cordage Company*, 102 Mass. 572.

"The question in such cases," says the Supreme Court of Massachusetts, "is not of due care on the part of the plaintiff, but whether the cause of the injury was one of which he knowingly assumed the risk, or one of which, by reason of his incapacity to understand and appreciate its dangerous character, or the neglect of the defendants to take due precautions to effectually inform him thereof, the defendants were bound to indemnify him against the consequences."

But, if it be a question of due care on the part of the plaintiff, the conclusion must be the same; for a plaintiff's right to recover, is not affected by his having contributed to the injury, if he was without fault in doing so. When it is shown that the defendant has been negligent, and his negligence has caused the plaintiff's injury, the latter is entitled to recover, unless it appear that he has been negligent in respect to the matter complained of, and might have avoided the consequences of the defendant's negligence. His conduct, contributing to his injury, must, to defeat his action, amount to at least ordinary negligence, that is, want of ordinary care. Hence, notwithstanding the plaintiff below may have ignor-

antly contributed to the injury he sustained, if he was not guilty of negligence in so doing, he might, nevertheless, maintain his action. It is not apparent how, in the case stated in the instruction to the jury, the plaintiff could be in fault, unless his extreme youth and inexperience be a fault. Ignorance may be a misfortune, but when it is not willful, and no duty arises to be informed, with the means of information at hand, it is not negligence of which the person charged with the duty of giving proper instructions on the subject, which he failed to perform, can complain or take advantage.

The instruction negatives any inference of negligence; for according to it, to enable the plaintiff to recover, it was necessary for the jury to find, that he did not know that the act which he did, that contributed to his injury, was likely to injure him, and that this want of knowledge was owing to his age and lack of judgment, and the failure of the defendant to properly instruct him; and that the act so done by him, was in the discharge of his duty as he understood it. If, as already seen, it is the duty of persons employing children in dangerous situations, to properly instruct them concerning the dangers, which on account of their youth and inexperience they may not understand, it would seem to follow, as a necessary conclusion, that such employe, who has not been so instructed, and who, while in the discharge of his duty as he understands it, suffers an injury in consequence of the employer's negligence, may maintain an action against his employer therefor, notwithstanding that, by reason of his youth and inexperience, and the failure of the employer to properly instruct him, he did some act, in the performance of his duty according to the judgment and knowledge he possessed, which contributed to the injury, but which he did not know, and was not advised would be likely to injure him.

When the whole instruction is taken together, wherein the jury were at the outset advised, that it was the duty of the plaintiff to use ordinary care, it is obvious they could not well have been misled.

*Judgment affirmed.*

## CINCINNATI v. SEASONGOOD.

*Street improvement—Special assessment—Retroactive law.*

A municipal corporation having through its proper boards and officers passed a resolution and ordinance to improve a street, in its assessment of the cost and expense of the improvement upon the abutting property, it should be governed by the law in force at the time of the passage of its improvement ordinance, with respect to the manner of assessment and the rights and liabilities of the owners of abutting property.

(Decided February 26, 1889.)

Error to the Circuit Court of Hamilton County.

Adolph J. Seasongood and Louis Seasongood, executors of Jacob Seasongood, and Louis Heidelberg, executor of Philip Heidelberg, the defendants in error, brought their action in the court of common pleas, against the city of Cincinnati, and E. O. Eshelby, Comptroller of Cincinnati, to enjoin the collection of an assessment for a street improvement claimed to be excessive. The original petition reads as follows:

"The plaintiffs say that the city of Cincinnati, defendant, is a city of the first grade and first class under the Municipal Laws of Ohio, and that E. O. Eshelby is the Comptroller of said city.

"They are the executors of Jacob Seasongood, deceased, and of Philip Heidelberg, deceased, as stated in the caption, whose estates are jointly the owners of the following property: being a lot on the S. E. Cor. of Third and Main streets, Cincinnati, between Pike street and a point on Third street, 252 feet east of Smith street, and lying lengthwise on Third street 104.50 feet, and 36 feet 8 inches in width.

"Plaintiffs further say that on June 15th, 1885, the said city, by its board of Public Works resolved that it was necessary to improve said Third street between Butler street and a point on Third street 252 feet east of Smith street with granite blocks, one-half the expense to be paid by said city, and one-half to be paid by the owners of property bounding and abutting thereon, by an assessment to be levied by the foot

46	296
53	463
46	296
58	236
46	296
52	122
46	296
64	52



front, and if not paid in cash, to be paid in ten equal annual installments with interest thereon, under an act entitled 'An Act supplementary to Section 2293, Revised Statutes of Ohio,' passed April 25, 1885, according to plans and profiles referred to in said resolution as being on file in the office of the Engineer of said city, said portion of Third street having been previously improved under the direction of said city, at the expense of abutting owners with bowlders, and being at the time thus improved, and in use by the public.

"On the 26th day of October, 1885, the Board of Public Works of said city, on behalf of said city, passed an ordinance after due publication of said resolution, to improve said part of Third street, omitting the square between Pike and Butler, with granite blocks according to the terms of, and in pursuance of, said resolution of June 15, 1885, and in said ordinance it was provided that the expenses of said improvement including interest on bonds, if they be issued, shall be assessed per front foot upon the property abutting thereon, according to the laws and ordinances on the subject of assessments, and on ——— day of September, 1886, after due advertising for bids, the said city entered into contract for the improving of said street between the points named, to-wit: from Pike street to a point on Third street, 252 feet east of Smith street, according to the terms of said resolution (with the square between Pike and Butler omitted), and the ordinance, and said improvement was so made and completed and was accepted by said city on August 3d, 1887.

"The total cost of said improvement was \$115,081.56, one-half of which was paid by the city, and one-half, \$57,540.78 was assessable upon the property of the abutting owners, which cost includes advertising and engineering in addition to the contract price. The actual number of feet frontage is 8988.61 feet.

"On August 12, 1887, the Board of Public Affairs passed an assessing ordinance on the abutting property for the collection of one-half of the costs, and assessed each front foot of actual frontage \$6.401521 per foot, if paid in cash, or if paid in installments then for one-tenth of said assessment with in-

terest on the deferred installments at 5 per cent. per annum per foot front.

"Plaintiffs further say that in making said assessment and in apportioning the amount of the abutting property of plaintiffs, the assessment was made upon the entire lengthwise actual frontage of said lots without first fixing the front of said lots to the usual depth of lots by the average of two blocks, so as to be a fair average of the depth of lots in the neighborhood, and the assessment, as now made, is on the full lengthwise frontage of said lots.

"Plaintiffs further say that the assessable frontage of their lot, when fixed according to the average of lots, would be 60.2 feet instead of 104.50 feet; and that the assessable frontage of the part of Third street improved would be in all 8891.14 feet instead of 8988.61 feet, the basis adopted by said city. And that the rate of the cash assessment per foot front would be \$6.4717 instead of \$6.401521 as fixed by the assessing ordinance, and that the cash assessment of plaintiffs would be as revised \$393.60 instead of \$668.96, and the assessment on the ten year plan would be less in the same proportion if revised accordingly.

"Plaintiffs further say that the defendants insist upon the collection of said assessment as now made and apportioned to their lot, and they refuse to change or amend it or to receive any assessment or installment unless the full amount is paid; and defendants say that unless the full amount is paid as assessed and apportioned they will add a penalty thereto, and for the purpose of collecting the same by summary process and by sale of their property, they will certify the assessment to the auditor of the county, who will place it upon the tax duplicate of the county with penalty, and will so force their collection by the sale of their property unless restrained therefrom by the injunction of this court which is the plaintiff's only remedy.

"Wherefore, plaintiffs pray for a perpetual injunction against defendants, restraining them from collecting or attempting to collect any part of said assessment in excess of \$393.60, and for all other proper relief."

To this petition there was a general demurrer, which the court overruled. The defendants not desiring to plead further, and the cause being submitted to the court upon the pleadings, the court found the allegations of the petition to be true, "and that the assessable frontage of plaintiffs' lot at the south-east corner of Third and Main streets, Cincinnati, for the improvement of Third street with granite, is 60 1-5 feet instead of 104.50 feet as now assessed; and that the cash assessment of plaintiffs' lot should have been \$393.60, instead of \$668.96."

It was therefore ordered, adjudged and decreed that the assessment of plaintiffs' lot in excess of \$393.60 and interest on the several installments, if said sum be paid in installments, "be and the same is declared void;" and that the defendants be perpetually enjoined from collecting or attempting to collect any part of said assessment in excess of the sum named if paid in cash, or including the interest thereon if paid in installments, and that said assessment be revised accordingly.

On petition in error by the defendants, the circuit court affirmed the judgment of the court of common pleas, and to reverse such judgment of affirmance this proceeding is instituted.

*Horstman, Hadden, Foraker & Galvin*, for plaintiffs in error.

*W. M. Ampt* and *F. C. Ampt*, for defendants in error.

DICKMAN, J. The improvement of Third street in the city of Cincinnati, which gave rise to the special assessment under consideration, was made under the act of April 25, 1885 (82 Ohio L. 156), which authorizes the Board of Public Works in cities of the first grade of the first class, to cause any of the streets, avenues or highways of such city to be improved with granite block, asphalt pavement or other material. The enabling statute provides, that one-half of the cost of any such improvement shall be paid by the city at large, and that one-half of the entire cost of such improvement shall be assessed upon the parcels of land bounding or abutting upon the improvement, in the manner provided by law. And in making such improvement, the Board of Public Works is to have and

exercise all the powers and perform all the duties of council, in the prosecution of the work or furnishing materials therefor, the making and levying assessments therefor, and the enforcement and collection thereof.

On June 15, 1885, the Board of Public Works of Cincinnati, in compliance with the provision of the statute, declared by resolution the necessity of improving a part of Third street with granite blocks; and on October 26, 1885, in behalf of the city, passed an ordinance to make such improvement in accordance with the terms of such resolution. The ordinance provided, that one-half of the expense of the improvement should be assessed per foot upon the property abutting thereon, according to the laws and ordinances on the subject of assessments. In the year 1886, the city entered into a contract for improving the street, and the improvement was completed and accepted on August 3, 1887.

At the times when the resolution declaring it necessary to improve, and the ordinance to improve were passed, and also when the contract for the improvement was made, the law governing special assessments, enacted March 27, 1884 (81 Ohio L. 86) provided as follows:

“Section 2269. \* \* \* If there is land not sub-divided into lots, the council shall fix the value of the lots or the value of the front of such land to the usual depth of lots by the average of two blocks, one of which shall be next adjoining on each side, and if there are no blocks so adjoining, the council shall fix the value of the lots or lands to be assessed so that it will be a fair average of the assessed value of other lots in the neighborhood; and if in making a special assessment by the foot front, there is land bounding or abutting upon the improvement not sub-divided into lots, *or if there be lots numbered and recorded, bounding or abutting on said improvements and lying lengthwise of said improvements*, the council shall fix, in like manner, the front of such land to the usual depth of lots, so that it will be a fair average of the depth of lots in the neighborhood which shall be subject to such assessment.”

This statute was amended March 11, 1887 (84 Ohio L. 72), by omitting from the section the clause, "or if there be lots numbered and recorded, bounding or abutting on said improvements and lying lengthwise of said improvements." After such amendment,—on August 12, 1887—an assessing ordinance was passed to defray the cost of the improvement. In levying the assessment, and in apportioning the amount to the lot of the defendants in error, the assessment was made upon the entire lengthwise frontage of the lot on Third street, without first fixing the front of the lot to the usual depth of lots by the average of two blocks, so as to be a fair average of the depth of lots in the neighborhood. Under the statute as amended March 11, 1887, the assessable frontage of the defendants' lot was held to be 104.50 feet, and the cash assessment \$668.96, whereas, under the operation of the act of March 27, 1884, the assessable frontage would have been only 60.2 feet, and the cash assessment \$393.60 only.

The material question, therefore, presented in this cause by the petition and demurrer is, under what law should the assessment have been made; whether the act of March 27, 1884, which was in force prior to and at the time of the passage of the ordinance to improve, should have been applied, or the law as amended March 11, 1887, after the passage of the ordinance to improve, but prior to the passage of the assessing ordinance.

The law contemplates that before the ordinance to make the improvement is passed, there shall be certain preliminary proceedings. Such ordinance is the resultant of those proceedings, and evidences the final determination of the property-owners, through their public agents, to assume whatever burdens may be entailed upon them by the law in force when the improvement ordinance is passed. To enable the city to determine whether it is best to undertake the improvement—to afford persons interested an opportunity to be heard, and if desired, to protest or submit objections to the work, the necessity of the improvement is to be declared by resolution, and notice of the resolution brought home to the abutting owners. Plans and profiles are to be prepared and placed on file for

public inspection ; a careful estimate is to be made of the cost of the work ; and the owners of lots or land abutting upon the proposed improvement are afforded an opportunity of filing their claims for damages. At the expiration of the time limited for filing claims for damages, the council is to determine whether it will proceed with the improvement or not, and whether the claims for damages shall be judicially inquired into.

Having determined to make the improvement, it is provided by amended section 2264 of the Revised Statutes (78 Ohio L. 259), that the costs and expenses of the improvement, or any part thereof, which may not be assessed on the general tax list, "shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the feet front of the property abutting upon the improvement, as the council, by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made, *and in the manner and subject to the restrictions herein contained.*" It is evident from the language of this section, that the property to be assessed, and the mode of assessment, whether by benefits, by valuation, or by the foot front, are to be determined by ordinance before the improvement is made ; and the assessment is to be in the manner, and subject to the restrictions prescribed by the statute in force at the date of the improvement ordinance.

Although special assessments, when made according to law, become a lien from the date of the assessment, upon the respective lots or parcels of land assessed, the owner will not be liable, under any circumstances, beyond his interest in the property assessed, at the time of the passage of the ordinance or resolution to improve.—Rev. Stats. sec. 2286. At the date of the ordinance to improve, the defendants in error could not have been held liable on more than 60.2 feet—the frontage of their land as measured on Third street to the usual depth of lots. That was the extent of their assessable interest at the

time the ordinance to improve was passed, and the passage of the ordinance is the date fixed by the statute to which their personal liability on the assessment is to be referred.

It is reasonable to presume that the passage of the ordinance to improve the street, was not without reference to existing rights and liabilities. The ordinance was doubtless passed in full view of the law as it then stood in regard to special assessments. It embodied the scheme of the street improvement, and in passing it the Board of Public Works could not have contemplated any assessments other than those which were then authorized by statute. The assessment was only in aid of the improvement scheme as declared in the improvement ordinance, and did not enlarge or diminish the rights or liabilities of the defendants at the date of the passage of such ordinance. By virtue of the law then in force, they were obligated to pay an assessment on the basis of 60.2 feet of frontage, but under an amendment of the same law after the passage of the improvement ordinance it is claimed they became liable on 104.50 feet. In our view, under the prior act they became vested with a substantial right of which they could not be deprived by the operation of the subsequent law.

Under the constitutional prohibition, the general assembly has no power to pass retroactive laws. Art. II, sec. 28. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past must be deemed retrospective or retroactive. *Society for Prop. of Gospel v. Wheeler*, 2 *Gallison*, 105. Puffendorf says: "A law can be repealed by the law giver; but the rights which have been acquired under it while it was in force, do not thereby cease. It would be an act of absolute injustice to abolish with a law all the effects which it had produced." *Droit de la Nat.* L. 1, c. 6, § 6. There is nothing in the language of the act of March 11, 1887, passed after the ordinance to improve, which gives it other than a prospective operation; and it can not by judicial construction be made to act retro-

spectively to the impairment or destruction of vested rights. In our view, if the property of the defendants is not to be assessed in the mode or manner prescribed by the act of March 27, 1884, a vested right acquired under existing laws is taken away, and a new obligation is created, and a new liability imposed by an amendatory statute operating not only retroactively, but contrary to the equity and justice of the case.

It is a general rule, that retrospective laws which conflict with a state constitution, or which tend to divest vested rights of property, are void, and courts will always struggle to give laws a prospective construction or interpretation. Sedgwick on Stat. and Const. Construction, 346, 2 Ed.

*Houston v. McKenna*, 22 Cal. 550, is an illustrative case of constitutional analogy, although a case in which by giving a retroactive effect to the law, the obligation of the contract would have been impaired. The plaintiff, in November, 1860, entered into a contract for the improvement of streets in San Francisco under the law of 1859, which provided that for payment an assessment should be levied upon the adjacent lots in proportion to their respective values. Before the completion of the work the amendatory act of 1861 was passed, providing for an assessment in payment of such contracts according to the street frontage of each lot. It was held, that the provisions of the law of 1859 respecting the mode of assessment was part of the contract, and that the assessment, though made after the amendatory act, must be in the mode prescribed by the old law. Crocker, J., in delivering the opinion of the court, says: "The act of 1861 changes the rights of the plaintiff and the liability of the property and its owners, by changing the extent of that liability—making some to pay more and others a less sum than they would have been liable to pay under the act of 1859. Such a result can only be avoided by giving the act of 1861 a prospective effect—that is, limiting its application to those contracts made after it took effect. It is a well settled rule of law that statutes should not receive a retroactive construction, unless the intention of the legislature is so clear and positive as by no possibility to admit of any other construction."



We are not without adjudicated cases in Ohio and elsewhere, which go far to establish the rule, that the rights and liabilities of abutting owners growing out of special assessments for street improvements, are fixed by the law existing when the improvement is ordered.

In *Douglass v. Cincinnati*, 29 Ohio St. 165, the council in March, 1875, declared by resolution the necessity of the improvement. The ordinance directing the improvement was passed, it seems, during that year. In January, 1876, the council passed an ordinance assessing the cost of the improvement by the foot front, on the several lots of land abutting on the improved street. On November 8, 1875, Mrs. Douglas, the owner of an abutting lot at the time of the preliminary proceedings, conveyed to Corry that part of the abutting lot which fronted on the street, retaining the part which was in the rear of the strip conveyed. Mrs. Douglas set up by way of defense, that at the date of her conveyance to Corry, the ordinance assessing the cost of the improvement had not been passed; and that the part of the premises not so conveyed did not abut on the street, and was not subject to the lien created by the assessment. But it was held, that what constitutes abutting property liable under the municipal code to be assessed for the improvement of a street, is to be determined by the situation of the property at the time of the passage of the ordinance directing the improvement; and that the subsequent proceedings were merely the carrying out the scheme of improvement provided for in the ordinance.

In *Spangler v. Cleveland*, 35 Ohio St. 469, it was held that where an assessment is per foot front, and is based upon an estimate of the cost, and a certain number of feet frontage, and the cost of the work falls below such estimate, the court, in reducing such assessment to the actual cost, and in fixing the cost per front foot, should not deduct from the frontage actually assessable when the improvement was ordered, any part thereof subsequently appropriated by the municipal corporation for streets. In other words, the lot-owners were liable according to the feet front assessable when the work was ordered.

VOL. 46—20

dered, and not according to the frontage as afterward reduced by appropriation.

Our attention has been called to the case *Griswold v. Pelton*, 34 Ohio St. 482, in which the court in considering the effect of sections 542 and 543 of the municipal code, uses the language, "These sections were in force at the time the assessing ordinance was passed, and govern the rights of the parties in this controversy, in respect to the limitations named, to the protection of which the plaintiff is clearly entitled." In that case, the assessment was confined to the front of the land to the usual depth of lots. The limitation of the assessment to twenty-five per cent. of the value of the property assessed after the improvement is made, was in force when both the improvement and assessing ordinance were passed. And as to the main point of contention, that the assessment should not be in accordance with section 543—as amended after the improvement ordinance was passed—which authorized a levy each year of an amount of the special assessment not exceeding ten per cent. of the value of the land after the improvement is made, it will be observed, that the question was chiefly as to the mode of payment or number of installments, and not, as in the case at bar, whether the amount of the assessment should be increased beyond what it would have been if levied at the time the ordinance of improvement was passed.

Entertaining as we do the opinion that the defendants in error acquired a vested right under the act in force at the time of the passage of the improvement ordinance, which, by virtue of the constitutional inhibition, could not be impaired or taken away by the subsequent amendment and repeal of the act, we deem it unnecessary to consider whether the various steps in council and before municipal board, with respect to a street improvement, constitute a pending *proceeding* within the meaning of section 79 of the Rev. Stats., which could not be affected by such repeal or amendment of the law. But we may refer to the case *Raymond v. Cleveland*, 42 Ohio St. 522, in which it is held, upon forcible reasoning, that the successive steps to make an assessment or re-assessment for a street improvement, constitute a *proceeding* within the follow-

ing saving clause of section 1539 of the Revised Statutes: "No suit, prosecution, or proceeding shall be in any manner affected by such change, but the same shall stand or proceed as if no such change had been made."

For the foregoing reasons, we have reached the conclusion, that the judgment of the circuit court should be affirmed, but without regard to the question, whether there was a contract on the part of the state—which the city in its governmental capacity represents—with the property owners, that the law would not be changed as against them; or whether a contract obligation arose between the property owners and the city after the passage of the ordinance directing the improvement to be made.

*Judgment affirmed.*

### WOOLLEY ET AL. v. PAXSON ET AL.

*Devise to children as a class, one or more of whom predecease testator—Construction of § 5971 R. S.*

48	307
367	332

1. The provision of the statute of wills providing against the failure of a devise to a child or other relative of a testator by the death of the devisee in the life of the testator, (§ 5971 Rev. Stat.) applies to a devise to "children" as a class.
2. P. executed his will in 1868 and died in 1884. Among other objects of his bounty, there were living at the date of the will, his wife, his son Isaac and four children of the latter, James, Michael, Almira (intermarried with W.) and Nancy (intermarried with C.), all of whom were adults. He devised all his estate to his wife for life, and directed that, at her death, the land should be converted into money and, with other funds arising from his estate, divided into four equal parts, one of which he directed to be invested in lands and conveyed to his son Isaac for life, remainder to his children in fee-simple. The wife, his son Isaac and the latter's two daughters, Almira and Nancy, died before the testator—the daughters intestate, but each leaving issue surviving the testator. *Held:* That under the provisions of the statute then in force relating to a devise to a child or other relative of the testator (63 Laws, 47 § 56), incorporated in § 5971 Revised Statutes, the surviving issue of each of the two daughters of Isaac take the share of the devise to Isaac's children, which the deceased mother would have taken, had she survived the testator.

(Decided February 26, 1889.)

---

Woolley *et al.* v. Paxson *et al.*

---

## ERROR to the Circuit Court of Green County.

*Brown & Antrim*, for plaintiff in error, A. L. Woolley, guard.

The rule, that the intent of the testator, when it can be ascertained, shall govern in the construction of wills, is too well established to require the citation of authorities. For some purposes a will is considered to speak from the date of its execution, and for others from the death of the testator. Jar. on Wills, vol. 1, p. 591. It appears to be a well settled rule, that for the purpose of ascertaining the *objects* of gifts, the will speaks from its date or execution. *Id.* p. 597.

According to these rules who were the objects of the gift of the testator in this case? The children (without qualification) of Isaac Paxson. Who were the children of Isaac Paxson? James, Michael W., Nancy E. and Almira.

Had the testator died on the 23rd day of January, 1874, would anyone doubt that his intention was that James, Michael W., Nancy E. and Almira should all participate in the distribution of his bequest? We think not.

If, then, under those circumstances the intention of the testator, as expressed in the will, was that James, Michael W., Nancy E. and Almira were all objects of his gift, can the construction of the will be changed by the fact, that instead of dying on the 23rd of January, 1874, the testator's lease of life was extended to December 12th, 1884, while Nancy E. and Almira, two of the objects of the gift, departed this life prior to that date?

We hold that the intention of the testator having once been ascertained, is not affected by lapse of time or change of circumstances.

Almira Woolley, being a child of Isaac Paxson, and therefore a devisee under the will, we insist that notwithstanding the fact that she died prior to the testator, or even if she had died prior to the making of the will, her issue, Pearl Woolley, having survived the testator, shall take the estate devised in the same manner as said Almira would have done if she had survived the testator. Rev. Stats., sec. 5971.

Whatever may have been the rule at common law in regard to survivors alone sharing in the distribution, the above statute is explicit in its provisions that a bequest shall not fail or pass to others if the legatee leave issue surviving the testator.

*W. A. Paxson*, for defendants in error.

In the construction of a will, the rule in Ohio is found in *Townsend's Ex'rs v. Townsend*, 25 Ohio St. 477, and followed in numerous cases, latest in point of time, *McKelvey v. McKelvey*, 43 Ohio St. 217.

What is the intention of the testator, (1) as to his property, (2) as to the distribution of it? His first intention was, as gathered from the will, to convert his whole estate into money, and upon that money basis, make an equal distribution between the four beneficiaries named, viz: Julia A. Stroop, Geo. Varner, Ezeriah and Isaac Paxson, with the additional proviso, that the shares of the latter two should be re-invested in real estate for their benefit "during life, *afterward* to their *children*." There is no ambiguity there; the direction is plain and cannot be mistaken. The only thing necessary for the court to determine then, is what did the testator mean when he said "to Isaac, *afterward* to his *children*?" The intention must be ascertained from the words contained in the will, and if the words are technical they must be taken in their technical sense. Is the word *children* a technical word? If so, what is its technical meaning? Webster defines it: "Plural of child; a son or daughter; a male or female descendant in the *first* degree." The word *heirs* is a flexible term, and may mean descendants or ascendants, but the word *children* can never be held to include grand-children if there are any children answering that description. This is a universal rule as laid down in Wharton, Jarman, Redfield, and all the standard authors on the subject, both English and American, and is so held by all courts, a very full list of authorities being found in the case of *Cummins v. Plummer*, 48 Am. Reps. 167. See also *Bunnel v. Evans*, 26 Ohio St., where this court has held the words *heirs* and *children* when used in the same will, to mean children to the exclusion of legal heirs who were not children. The very last

---

Woolley *et al.* v. Paxson *et al.*

---

clause in the decision in the case of *Hamilton v. Rodgers*, 38 Ohio St. 258, is as follows, viz.: "The estate will pass to and vest only in the person answering the description of the will at the time of distribution." See also *Sinton v. Boyd*, 19 Ohio St. 34; 4 Kent. Com. sec. 345; Jar. Wills, v. 2, p. 692; 2 Red. Wills, 239; 2 McCord, Chan. R. 214—445; 1 Hills' Chan. 311.

The defendants base their sole right to this estate upon sec. 5971, Rev. Stat. Ohio. Let us construe this statute and the will in the light of the well established authorities. The first question is, how do these children take, by descent or by purchase? The second question is, when does their title vest? and third, can they take under this will? As to the first question, they could not take by descent from Isaac, their grandfather, for two reasons, viz.: 1st, he would only have had a life estate had he survived the testator, 2nd, he had no vested interest, (they could not take by descent from their mothers, for they had no vested interest) and there was therefore nothing to descend. This estate is a remainder, made so by the terms of the will. It is a well known rule, that "A remainderman always takes by purchase, and never by descent." 2 Washburn Real Prop. 540.

See also *Ib.* page 554; *Richey v. Johnson*, 30 Ohio St. 288; *Needles v. Needles*, 7 Ohio St. 445; *Gilpin v. Williams*, 25 Ohio St. 295; 31 Ohio St. 144; 32 Ohio St. 109; 4 Kent's Com. 314; 2 Wash. Real Prop. 554; 4 Kent's Com. 328; *Id.* 330—345.

Upon the *time* when this estate vests, I desire to submit the following authorities without further comment or question than to say that it is the universal rule, that where the time of distribution is deferred, there can be no prior vesting of an estate, and only those answering the description at the time of distribution will be entitled to take, *non obstante* Revised Statutes: 3 Jarman, 696, fluctuating class; 2 Redfield, 10 to 20, class, children; 15 N. Y. Rep. 322; 1 Hill's Chan. 311; 2 McCord, Chan. 445, 214, 258; 2 Redfield on Wills, 226, 236, 9, 40, *et seq*; 2 Jarman, 692, 700; 3 Vesey, 289; 2 Redfield on Real Prop. 561; *Id.* 603, 4; *Smith v. Block*, 29 Ohio St. 497; 4 Kent,

---

Woolley *et al.* v. Paxson *et al.*

---

206, 7; 1 Fern on Rem. 5; 2 Washburn Real Prop., sec. 230, p. 552, and sec. 261, p. 388; *Richey v. Johnson*, 30 Ohio St. 298; *Hamilton v. Rodgers*, 38 Ohio St. 256; *Bunell v. Evans*, 408, 10; 2 Redfield on Wills, 226, 243, expressly.

*Charles Darlington*, for plaintiffs in error, Euphemia and Maggie Caulfield.

Reply to brief of W. A. Paxson.

The common law rule is as claimed by counsel for defendant in error.

But the iniquity and injustice of such a rule, and its perversion of the testator's intention were long since felt, acknowledged, and the rule changed by statute. The alteration of the common law in this respect was first had in England, and is found in the 33d section of the Act of 1 Vict. C. 26. As this section has been in substance reenacted in a large number of our states, Ohio included, it may not be amiss to look at the construction placed upon it by the English courts so far as they have been called upon to do so. *Johnson v. Johnson*, 3 Hare, 162; *Winter v. Winter*, 5 Hare, 312.

We are not, however, without some authorities to guide us in the construction of this statute.

In the case of *Moore v. Diman*, 5 R. I. 121, the facts were very much like those of the case at bar; and under a statute substantially like ours, a conclusion was reached by the Supreme Court in harmony with the conclusion drawn from our own statute. See also, Jar. Wills, p. 75; 8 Ves. 375; 10 East. 503; 4 Madd. 495; 7 Metc. 30.

Right in line with the Rhode Island case is the case of *Moore v. Weaver*, 16 Gray, 305, in which the same will is construed under a similar statute in Massachusetts, and a like conclusion reached.

In Missouri, under a similar statute, a like conclusion has been reached. *Jamison, Ex. v. Hay et al.*, 64 Mo. 546; *Guitar v. Gordon*, 17 Mo. 408.

The court of last resort in the state of Georgia, has likewise given a similar construction to a somewhat similar statute. *Cheny, Ex. v. Selman*, 71 Ga. 384.

Kentucky has taken the same view of a similar statute. *Yeates et ux. v. Gill*, 9 B. M. 203.

"In the case of a legacy to a legatee for life, with remainder to another legatee, if the tenant for life dies before the testator, the remainder over takes effect upon the death of the testator." Williams on Executors, vol. 2, bottom page, 1219.

MINSHALL, J. The original suit was brought by the executor of Aaron Paxson, deceased, to obtain a construction of an item of the will, about which he was embarrassed in the execution of his trust. The testator first devised all his estate to his wife for life, and then, after making certain other provisions, by the eighth item, on which the questions arise, he first directs his executors (we give the substance quoting only those parts where the language is material) on the death of his wife to convert his lands into money, and to divide the proceeds and other funds arising from his estate, into four equal parts, one of which he then gives to his daughter Julia A. Stroop "if she be living, or to her heirs if she be dead at the time the same is ready to be paid;" he then gives a like share and upon the same terms to the son of his daughter Ivey Varner. He then disposed of the other two shares as follows: One is to be invested in land as soon as practicable by his executors, and "conveyed" to his son Ezeriah Paxson "for the term of his natural life and to his children in fee-simple afterwards." The other is, in like manner, to be invested in land as soon as possible, and "conveyed" to his son Isaac Paxson "for the term of his natural life afterwards to his children in fee-simple." And in the selection of lands so to be purchased for his sons Ezeriah and Isaac *and their respective children*, he directed that his executors should be guided as far as practicable by the choice and wishes of his respective sons; and directed the money to be kept at loan on interest properly secured, until the investment should be made.

The facts on which the questions as to the construction of the devise arise, were found by the court. From this finding it appears that the will was made in 1868, and the testator died in 1884; that at the time of the making of the will Isaac



was living, and had also four children living, two sons, James and Michael, and two daughters, Almira intermarried with Alexander L. Woolley, and Nancy intermarried with John Caulfield; that Isaac, his mother, wife of the testator, and his two daughters, Almira and Nancy, all died before the testator; and that the two daughters both died intestate, leaving issue that survived the testator, to-wit: Pearl Woolley, an infant daughter and only child of Almira, and Euphemia and Maggie Caulfield, infants and only children of Nancy. The court also found that it will be for the interests of all concerned, Isaac being dead and no purchase having as yet been made, for the executor to sell the land and distribute the proceeds according to the terms of the will.

The two sons James and Michael, who survived the testator, claim that as the surviving children of their father, Isaac, they are entitled to the entire devise made to his children. On the other hand it is claimed that the issue of Almira and Nancy each take the share which the mother would have taken, under the devise to the children of Isaac, had she survived the testator. If no change had been made by statute in the rule adopted by courts for the construction of a devise to children as a class, the construction claimed by the surviving sons must prevail, however unjust it may seem. Hawk. Wills, ch. 7. But a provision of our wills-act, introduced in 1840 (Swan's Stat. 1841 p. 999), amended in 1886, (S. & S. 934), and, as amended, embodied in § 5971, Revised Statutes, reads as follows:

"Sec. 5971. When a devise of real or personal estate is made to any child or other relative of the testator, if such child or other relative shall have been dead at the time of the making of the will, or shall die thereafter, leaving issue surviving the testator, in either case such issue shall take the estate devised in the same manner as the devisee would have done, if he had survived the testator; or if such devisee shall leave no such issue, and the devise be of a residuary estate to him or her, and other child or relative of the testator, the estate devised shall pass to, and vest in such residuary devisee surviving the testa-

tor, unless a different disposition shall be made or required by the will."

The court below, under the provisions of this statute, construed the will in favor of the claim of the issue of Almira and Nancy. On error the circuit court reversed the judgment of the common pleas. We think, however, that the common pleas was right, and that its judgment should have been affirmed.

The rule as to the lapsing of devises and legacies that prevailed before the statute, defeated, in most cases, the intention of the testator. He generally made his will with reference to the objects of his bounty as they existed at the time and as though his will took effect at the date of its execution—not apprehending that a lapse would occur in case any of them should die before himself, unless some express disposition should be made in anticipation of such event. The statute was passed to remedy such disappointments, and should receive a liberal construction, so as to advance the remedy and suppress the mischief. It among other things provides that where a devise is made to a child or other relative of the testator, who dies before the testator, the issue of such object of his bounty shall take the portion devised to such child or relative. Nothing is more just and conformable to the probable intention of the testator in every instance. The fact that the child or relative is not mentioned by name should not defeat the application of the statute, where the language applied to the facts, as they were at the execution of the will, designates a child or relative as an object of the testator's bounty, with as much certainty as if it were mentioned by name. At the time the testator made this will his son Isaac had four children living. They were all adults and their names well known to him; and the devise that he makes is, to Isaac for life and then to *his children* in fee-simple. This, in the light of the circumstances, must be taken in a distributive sense, and is a devise to each of Isaac's children of the fee-simple in remainder, as definitely as if it had been to each by name. For, as observed by Vice-Chancellor Malins in *Re Porter's Trusts*, L. R. 8 Eq. 52, there can be no substantial difference between a gift, for instance, to six children named, and a gift to children simply, there being six.

The real objects of the gift are in such cases easily ascertainable by parol testimony.

It is not, however, claimed that the individuals constituting Isaac's children were, at the date of the will, indefinite, and so, incapable of taking as individuals under its provisions, but that the devise was to them as a class, and must be construed, under the rules applicable to such devises, not as a devise to each of the children, but to such of them as should survive the testator. The ground of this rule was that no one can be a devisee or legatee until the will takes effect by the death of the testator. But any argument drawn from this rule proves too much; for, if applied according to its reason, it would abrogate the statute, as no object, however definitely described, can take in this sense, until the will ceases by the death of the testator, to be ambulatory. It was upon this ground that a devise to one by name who predeceased the testator, was held to lapse. The fact that in the latter case the extinguished or lapsed legacy went to the residuary legatees, or to the heir, where there were no such legatees, whilst in the case of the death of a member of a class it went to the survivors, supplies no reason for excluding the application of the statute where the devise is to a class. It was not because the extinguished legacy or devise was disposed of by the law in one way rather than another, that the statute was adopted, but because it did not go to the issue of the deceased devisee, as the testator in all probability supposed it would. In other words, it was not designed to prevent the failure of a legacy by the death of the legatee before the testator, that were impossible, but to make a new disposition by law of such legacy, where the testator had himself failed to do so, in anticipation of the possible death of any one of the chosen objects of his bounty before himself, where such object was a child or other relative of his. Hence the only question that can arise in the construction of a will under this statute is, whether it, as a matter of fact, contains a devise of real or personal estate to a child or other relative of the testator, which such devisee would have taken had he survived the testator; if so, then by the express language of the statute, the issue of such devisee surviving the testator,

---

Woolley *et al.* v. Paxson *et al.*

---

"shall take the estate devised in the same manner as the devisee would have done if he had survived the testator," unless a different disposition shall be made or required by the will. Now, it is a settled rule that in a devise to children as a class, each member who survives the testator, then takes a vested interest in the devise: Hawk. Wills, 68; and this is so though the devise is not immediate, subject, however, in such case to the liability to be partially divested by children subsequently coming into existence before the period fixed for enjoyment. Hawk. Wills, 71; Schouler Wills, § 562. Hence, as under a devise to a class each member who survives the testator, would, independent of the statute, take an aliquot part of the devise as a tenant in common with the other survivors, therefore, under the statute in such case, the issue of a deceased member of the class surviving the testator, must take what the deceased would have taken had he survived. Any other construction would render the statute nugatory in a large class of cases to which its provisions are by its terms directly applicable.

It seems this is the first case that has been presented to this court requiring a construction of this statute. But statutes similar to our own have been adopted in most, if not all of the states of the Union. These, whilst differing in detail, in general provide, that if such devisee or legatee die before the testator, leaving issue who survive the testator, such issue shall take the estate as the devisee or legatee would have done, in case he survived the testator; and it has generally been held in these states, that the statute applies to a devise to a class as well as to a designated individual. *Moore v. Dimond*, 5 R. I. 121; *Moore v. Weaver*, 16 Gray, 305; *Guitar v. Gordon*, 17 Mo. 408; *Jamison v. Hay*, 46 Mo. 546; *Cheney v. Selman*, 71 Ga. 384; *Yeates v. Gill*, 9 B. Mon. 203.

But two cases are found in which a different view seems to have prevailed. *Gross's Estate*, 10 Pa. St. 360; *Young v. Robinson*, 11 Gill & J. 328. The only reason assigned in the former case is that, "The act was intended to prevent a vested legacy from lapsing by death, which," the court adds, "can not apply here, as the legacies did not vest at all until the

death of the testator." Now, it is strange that it did not suggest itself to the mind of so good a court, that no legacy vests until the death of the testator, and that such a construction would work a virtual repeal of the statute. Moreover, our statute is general in terms; it is not limited to vested devises only, but applies to any "devise of real or personal estate to a child or relative of the testator;" and, whether vested or contingent, it is declared, that where such devisee predeceases the testator, the surviving issue of such deceased devisee "shall take the estate devised *in the same manner* as the devisee would have done if he had survived the testator." The decision in *Young v. Robinson* is placed on the ground that the object of their statute is "to provide for such cases of legacies and devises as by the rules of law lapsed or failed to take effect by the death of the devisee or legatee in the life of the testator,"—the statute of Maryland providing that the devise "shall not lapse or fail of taking effect" by the death of the devisee in the life of the testator, but shall have the same effect to transfer the title in the property mentioned as if such devisee had survived the testator. This decision is placed on a mistaken notion of the essential element of a lapsed legacy. Every legacy is said to lapse that fails by reason of the death of the legatee in the life of the testator. Bro. Law Dic. "Lapse," 304. The disposition made by the law, in the absence of any statutory provision, is not material. It went to the residuary legatees or devisees, if there were such, and if not, it went to the heir, or where the failure occurred in a devise to a class, by the death of one of the members, it went to the survivors; but whether it went to residuary legatees, or to the heir, or to the survivors of a class, did not affect the essential character of the extinguished gift—it was, properly speaking, a lapsed legacy or devise in either case. The statute of Kentucky, like that of Maryland, also contains the negative clause "shall not lapse," and in *Yeates v. Gill, supra*, it was contended that it did not apply to a devise to "children," as in such case there can be no lapse so long as there are survivors of the class. But the court rejected this view, and said: "We are of the opinion that this statute was intended

to promote equality in the distribution of estates, and to subserve the probable intention of testators under a change of circumstances not expressly provided for only (as might be presumed), because express provision was not understood to be necessary ; and it should be construed liberally for the effectuation of those objects." It will be observed that our statute contains no such negative words ; it simply affirms that the issue of such deceased devisee surviving the testator, shall take what the deceased would have taken, had he survived ; and, as before observed, under our statute the construction is solved by determining whether, in that event, he would have taken as a devisee under the will.

It is also argued that the issue can not take because the devise to the children of Isaac is, as claimed, a contingent one, that is to say, depends not only upon their surviving the testator, but also the wife of the testator, to whom was given a life estate in the whole property, and, to the determination of which estate, the gift to the father for life as well as the remainder to the children was postponed. To this it may be answered : (1) That the vesting in interest of the devise is not made to depend by the will upon any condition whatever ; the devise is absolute—no adverbs of time nor words of survivorship being used, and therefore must be construed as a gift vesting in interest if not in possession at the death of the testator. Hawk. Wills, 71 ; *Linton v. Laycock*, 33 Ohio St. 128 ; Schouler on Wills, § 560, 562. (2) As heretofore shown, the statute applies to contingent gifts as well as to vested ones. And (3) that by the death of Isaac the tenant for life and of his mother, in the life-time of the testator, both of these prior life-estates were eliminated from the will, and the devise to Isaac's children was thereby accelerated so as to take effect at the death of the testator, not only as an estate in interest, but also in possession ; so that, if the inchoate devise was contingent at the date of the will, by reason of the creation of these life-estates, it ceased to be such before the death of the testator. By the extinction of these life-estates the devise to Isaac's children took effect at the death of the testator as an immediate devise to the survivors and the issue of such

as had deceased, in the same manner, and with like effect, as if no inchoate prior estates had been created at the date of the will. 2 Williams' Exr's, 1219. "If money from whatever source arising, be directed to be laid out in the purchase of land to be settled in any manner, equity will regard the persons on whom the lands are to be settled as already in the possession of their estates." Will. Real. Pr. 164.

The fact that before the death of the testator, his wife and his son Isaac had died, so that there were no prior intervening estates postponing in any way the bequest to Isaac's children, renders the decisions in *Richey v. Johnson*, 30 Ohio St. 288, and in *Hamilton v. Rodgers*, 38 Ohio St. 242, on which much reliance seems to be placed by counsel for defendant in error, wholly inapplicable here and their examination unnecessary.

It is also claimed that the form of the bequest to his daughter Julia A. Stroop, and to the son of his daughter Ivey Vanner, indicate an intention on the part of the testator, that the survivor only of the children of Isaac should take, and so as to his son Ezeriah's. But we think that the form of the former devises can shed very little light upon his intention as to the latter. In the first two instances the bequest to each, as well as to the heirs of each, is necessarily contingent, until the time for distribution arrives. For example, the designated share is to be paid Julia "if she be living, or to her heirs if she be dead at the time the same is ready to be paid," clearly indicating that "heirs" are to take by substitution, should the mother die before the time of payment arrives. If she survives that time, she takes absolutely, and the conditional gift over to the "heirs" is gone. In the latter instances the gift is to each son for life, and then to his children in fee-simple, without any condition as to either estate. The death of the father simply accelerates the enjoyment of, but does not create or vest the devise to the children.

*Judgment of the circuit court reversed, and that of the common pleas affirmed.*

OWEN, C. J., and WILLIAMS, J., dissent.

## HURLEY v. THE STATE.

*Witness—Previous declarations of, cannot be contradicted by party calling him.*

1. A party who calls a witness, and is taken by surprise by his unexpected, and unfavorable testimony, may interrogate him in respect to declarations and statements previously made by him, which are inconsistent with his testimony, for the purpose of refreshing his recollection, and inducing him to correct his testimony, or explain his apparent inconsistency; and for such purpose his previous declarations may be repeated to him, and he may be called upon to say whether they were made by him.
2. In case the witness denies having made such statements, or his answer is ambiguous concerning them, it is not competent for the party calling him, to prove them by other witnesses.

(Decided June 28, 1888.)

## ERROR to the Circuit Court of Hamilton County.

The plaintiff in error, Richard Hurley, was, at the January term, 1887, of the Court of Common Pleas of Hamilton County, indicted for the murder of John Keating. He was tried at the following May term of that court, and convicted of manslaughter. A motion for a new trial filed by him was overruled, and sentence was passed upon him. A bill of exceptions was duly taken, and allowed, from which it appears that upon the trial the state introduced Thomas Roberts as a witness, who testified that he was present at the homicide, and detailed the circumstances of its commission. Some portions of the testimony of the witness being unfavorable to the prosecution, the prosecuting attorney stated that the witness Roberts "had been sworn and examined as a witness at the inquest held by the coroner of Hamilton County, on the body of the deceased, and also as a witness before the grand jury; and that his testimony on both examinations was material for the prosecution, and that the prosecuting attorney being acquainted with the character of the testimony heretofore given by the witness, was induced thereby to call the witness, Roberts, in



behalf of the state; and that the statements of the witness now being testified to, were altogether different in essential and material points, from the testimony of the witness given at the coroner's inquest and before the grand jury; and that the state was taken by surprise by the testimony now being given by the witness, Roberts, and therefore the state had the right to show that the witness now under examination had made former statements contradictory of, and at variance with, his present testimony." Thereupon the prosecuting attorney was permitted, over the objections of the defendant, to cross-examine the witness concerning his testimony at the coroner's inquest; and to repeat to him certain statements, which the prosecution claimed he had made in his testimony on the former occasions referred to, materially different from his testimony on the trial, and much more favorable to the state; and to ask the witness whether he did not make such statements. And the prosecutor was also permitted, over the defendant's objections, to read paragraphs from the notes of the witnesses' testimony taken down by the coroner's clerk at the inquest, and signed by the witness, and then inquire of the witness if he did not, in his testimony before the coroner, make the statements so read to him; to all of which the defendant excepted in due form. The witness having in some instances denied that he made the statements in the language attributed to him by the questions of the prosecutor, and as read to him from the notes of the coroner's clerk, the state called the coroner's clerk as a witness, who was examined against the objections of the defendant, in regard to the testimony of the witness Roberts at the inquest, and was allowed to read to the jury, from his notes of the testimony given by Roberts before the coroner, those portions which the prosecutor had previously called Roberts' attention to, and about which he had inquired of him. These statements contradicted the testimony of the witness on the trial, and were more favorable to the state than his testimony on the trial. To this examination of the coroner's clerk, and the reading from his notes of Roberts' testimony at the inquest, the defendant duly excepted. The

---

Hurley v. The State.

---

judgment of the court of common pleas was affirmed by the circuit court, and the plaintiff in error prosecutes this proceeding to reverse those judgments.

*C. H. Blackburn*, for plaintiff in error.

*Wm. H. Pugh*, prosecuting attorney, for State.

WILLIAMS, J.

The only questions in this case are :

1. Should the state have been permitted to interrogate its witness, Thomas Roberts, in respect to his testimony at the coroner's inquest, and to read or repeat portions of that testimony to the witness, and then inquire of him whether he had so testified? and if so,

2. Was it then competent for the state to prove what Roberts testified at the inquest, by the coroner's clerk and his notes of the testimony taken on that occasion?

(1.) It is a well established rule of evidence, that a party is not concluded by the unfavorable testimony of his own witness, but may prove his case by other evidence. He is not precluded from proving any fact relevant to the issue, by any competent evidence, though it be a direct contradiction of the testimony of a former witness called by him. And generally, where a witness is an unwilling one, or hostile to the party calling him, or stands in a situation which makes him necessarily adverse to such party, his examination in chief may be allowed to assume something of the form and character of cross-examination, at least to the extent of permitting leading questions to be put to him. But a further question arises in this case, and it is, whether the party calling a witness may, upon being taken by surprise by his unexpected adverse testimony, be allowed to examine him concerning declarations or statements previously made by him, which are inconsistent with his testimony. That such previous declarations can not thus be made substantive evidence of the facts stated, is conceded; nor can such examination be permitted merely to impeach the witness. But, if the testimony of the witness is material to the cause, it is of importance that it be true. It

not unfrequently happens that a witness under the embarrassment of an examination, forgets, or omits to state, facts within his knowledge, or is disinclined to disclose fully and definitely what he knows. Ample opportunity should be afforded for the correction of such mistakes and omissions, and for eliciting fully the facts that are material to the issue. The recollection of the witness may be so refreshed by directing his attention to a former conversation or declaration, as to cause him promptly to correct his testimony or explain the apparent inconsistency. For this purpose such examination may afford valuable aid in judicial investigation ; and, if it be competent at all for that purpose, the reason for admitting it would seem to require, that the examination should be allowed to extend so far as to permit the former statements to be repeated to the witness, and inquiry to be made of him concerning them ; for the repetition of the statement itself, referring to the circumstances of its utterance, would be the most likely means of awakening the recollection of the witness, enabling him to recall the facts, satisfy him of his mistake, and induce a correction or explanation. Or, if the witness be a perverse or false one, such examination may serve to probe his conscience, and move him to relent and speak the truth. We think it a reasonable rule, that a party who calls a witness, and is taken by surprise by his unexpected adverse testimony, may be permitted to interrogate him in respect to declarations and statements previously made by him which are inconsistent with his testimony, for the purpose of refreshing his recollection and inducing him to correct his testimony, or explain his apparent inconsistency, and for such purpose his previous declarations may be repeated to him ; and he may be called upon to say whether they were made by him. Well considered cases and text books of authority recognize the rule as stated.

(2.) The other question in the case is one of importance, and not free from difficulty. Conflicting views have been expressed upon the subject by eminent judges and authors. The diversity of opinion, however, has not been so much with respect to what the law is, as to what it is contended it should be. No reported case has been found, where the question has been con-

sidered by this court. In the last edition of Greenleaf's Evidence, sec. 444, it is said, "Whether it be competent for a party to prove that a witness whom he has called, and whose testimony is unfavorable to his cause, *had previously stated* the facts in a different manner, is a question upon which there exists some diversity of opinion. On the one hand it is urged that a party is not to be sacrificed to his witness; that he is not represented by him, nor identified with him; and that he ought not to be entrapped by the arts of a designing man, perhaps in the interest of his adversary. On the other hand it is said, that to admit such proof would enable the party to get the naked declarations of a witness before the jury, operating, in fact, as independent evidence; and this, too, even where the declarations were made out of court, by collusion, for the purpose of being thus introduced. But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify; or, that the witness has recently been brought under the influence of the other party, and has deceived the party calling him." In support of the text the following cases are cited in a note to the section: *Wright v. Becket*, 1 M. & Rob. 414, 416, pr. Ld. Denman; *Rex v. Oldroyd, Russ & Ry.* 88, 90, per Ld. Ellenborough and Mansfield, C. J.; *Brown v. Bellows*, 4 Pick. 179; *State v. Norris*, 1 Hayw. 437, 438; *Dunn v. Aslett*, 2 M. & Rob. 122; *Bank v. Davis*, 6 Watts & Serg. 285.

The high estimation in which Prof. Greenleaf's work on evidence is justly held by the profession, and its usual accuracy, as well as the importance of the question itself, and the great doubt expressed upon it by the circuit court, may justify a somewhat careful review of the authorities. *Rex v. Oldroyd*, was a prosecution for murder. "The counsel for the prosecution at the close of the case, observed to the learned judge, that they did not mean to call the mother of the prisoner, Elizabeth Oldroyd, strong suspicion having fallen upon her as having been an accomplice; but the judge thought it right in compliance with the usual practice, (her name being on

the back of the indictment as having been examined before the grand jury) to have her examined, which was accordingly done. The learned judge, observing upon the examination, that the evidence given by the woman was in favor of the prisoner, and materially different from her deposition taken before the coroner, thought it proper to have the deposition read, *for the purpose of affecting the credit of her testimony so given on the trial*; and in summing up the case to the jury stated, that her testimony was not to be relied upon, and left the matter of the prisoner's guilt, entirely upon the other evidence. The question reserved for the opinion of the judges was whether it was competent for the judge, under the circumstances stated, to order this deposition to be read, *in order to impeach the credit of the witness.*" The report states that the judges were of "opinion that it was competent under the circumstances *for the judge to order the deposition to be read, to impeach the credit of the witness.*" The report further states that, "in this case the determination of the judges was *confined to the right of a judge to call for a witness' deposition, in order to impeach the credit of a witness* who on the trial should contradict what she had before deposed; but Lord Ellenborough and Mansfield, C. J., thought the prosecution had the same right." In the first place it may be remarked of this case, that it is doubtful if the course taken by the learned judge at the trial, would in any particular receive the approbation of American courts. His conduct appears altogether extraordinary. Then, under the circumstances of the case, since the prosecutor declined to call the witness, and the testimony was given under the direct order of the court, she could in no sense be regarded as a witness called by the prosecution; and her deposition to impeach her, was not offered by the prosecution, but was ordered read by the judge; and the decision of the case is expressly limited to the right of the judge to do so. It is clear the counsel for the prosecution did not consider that he possessed that right, or he would have called the witness at all events, and availed himself of her evidence if favorable, knowing that he could destroy it, if she gave evidence contrary to that she had given before the coroner, by putting in her deposition. The only support,

which this case affords for the doctrine that a party may prove the contradictory statements of his own witness to impeach him, consists of the *obiter* of two of the twelve judges. And in *Wright v. Beckett*, Bolland *B.*, speaking upon this subject said, that "with the exception of the opinion of the two learned judges in *Rex v. Oldroyd*, the authorities are uniform, in establishing, that a party can not contradict his own witness, but by giving evidence of facts bearing upon the issue."

*Wright v. Beckett*, was an action of trespass *quare claus. freg.*, tried before Lord Denman C. J. in the Lancaster Common Pleas. On the trial the plaintiff's counsel having examined four witnesses to prove that the plaintiff, and his predecessors, had immemorially exercised acts of ownership over the land in question, called a fifth, one Warrener, with a view to establish the same fact. Warrener, however, on being examined, contradicted the other four witnesses, and the plaintiff's counsel thereupon asked him, whether he had not given a different account of the facts to the plaintiff's attorney, two days before. The witness gave an evasive answer, and the plaintiff's counsel thereupon called the plaintiff's attorney, and proposed to ask him, whether the witness had not given to him, upon the occasion referred to, an account of the facts different from that now given by him in court, which the court permitted him to do. The jury having found a verdict for the plaintiff, a motion for a new trial, upon the ground that the evidence of the plaintiff's attorney had been improperly admitted, was afterward argued before Lord Denman and Mr. Baron Bolland. The judges differed in opinion; Lord Denman adhering to his ruling upon the trial, and Baron Bolland taking the opposite view. It is somewhat singular that Lord Denman in support of his opinion quotes from *Bullers Nisi Prius*, 297, as follows: "A party never shall be permitted to produce general evidence to discredit his own witness; for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him. But if a witness prove facts in a cause which make against the party who called him, yet the party may call

other witnesses to prove that these facts were otherwise; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only." And, it may also be noticed, that with the exception of *Rex v. Oldroyd*, all the cases cited by Lord Denman to sustain his opinion, *Alexander v. Gibson*, 2 Campb. 555; *Lowe v. Joliffe*, 1 W. Blackst. R. 365; *Goodlittle v. Clayton*, 4 Burr. 2224; *Friedlander v. The Royal Exchange Assurance Company*, 4 B. & Adol. 193, are cases in which the evidence admitted, was within the rule quoted from Buller's *Nisi Prius*, *supra*. But he says that, "Notwithstanding my respect for the different opinion which is entertained by my learned brother now present, and, as I believe, by others of great weight and authority, I retain that on which I acted at Lancaster." On the other hand Baron Bolland lays down the rule with great distinctness "that a party in a cause, is not to be permitted to give evidence of a fact, for the purpose of discrediting his own witness, unless such fact would of itself be evidence in the cause; but that where such fact is relevant to the issue, and so *per se* evidence in the cause, such proof is to be allowed to be given, although it may collaterally have the effect of discrediting the testimony of his own witness." And his remark, that the cases are uniformly to that effect, with the exception of the opinion of two of the judges in *Rex v. Oldroyd*, and it might be added, of Lord Denman, is justified by an examination of the cases referred to, both by Lord Denman and Baron Bolland in their respective opinions.

*Dunn v. Aslet*, 2 M. & Rob. 122, decides that "The counsel calling a witness who has given unfavorable evidence on cross-examination, may on re-examination, ask him questions to show inducements to betray the party who has called him." The action was assumpsit, on a warranty of a horse, "that he was quiet in harness." Plea, "that the horse was quiet in harness." Plaintiff called a livery stable keeper as a witness, who on cross-examination, stated facts tending to show that the horse was quiet in harness, and the warranty had not been broken. On re-examination plaintiff's counsel asked him

---

Hurley v. The State.

---

whether he had not been living with the defendant and his witnesses since he had been in town. This was the whole of the case. The plaintiff did not offer to prove any contradictory statements of the witness, and it is apparent that the admissibility of such evidence was in no way involved. It is true Lord Denman in the opinion says, that in *Wright v. Becket*, he expressed an opinion that the plaintiff might show "that the witness had given a different account of the matter, by which different account he had been induced to call him;" and that he thought, "on the same principle, a party calling a witness may examine him as to any fact tending to show he had been induced to betray that party." But the principle is not the same, for it is generally competent to show by the witness, his relation to the parties; and the case can not be regarded as an authority for the admission of the previous contradictory statements of a witness, when offered by the party calling him.

In the case of *Brown v. Bellows*, 4 Pick. 179, it is held that "the plaintiff being under the necessity of calling the subscribing witness to prove the execution of the agreement, was not precluded from contradicting his testimony given upon cross-examination, in relation to other facts." The case shows "the name of Thomas Lord was subscribed as a witness to the agreement." The plaintiff proposed to prove the execution of the instrument by another witness, who saw it executed, assigning as a reason that Lord was interested. The plaintiff, however, not choosing to prove the interest of Lord by his own answers, and no evidence being then in the case to show that he was interested, the judge ruled that he must be called. The plaintiff then called him, protesting that he ought not to be obliged to consider him as a witness, any further than to prove the execution of the agreement. In the course of the trial, it became material to establish the value of the fulling mill and other estate to be conveyed by the plaintiff, and that Lord was interested with the defendant in the purchase. To prove both of these facts the plaintiff examined a witness, Ormsby, who testified that Lord said to the defendant, "we had better give the twenty dollars, and then there will not be



any more trouble about the water;" and that the defendant then said to the plaintiff, "we will give you the twenty dollars." The competency of this testimony was the subject of decision by the court. The plaintiff did not contend that it was admissible to prove the contradictory statements of Lord merely, but urged that it was competent to prove the two material facts, viz., that Lord was interested, and the value of the property. The declarations appear to be part of a conversation at which the plaintiff and defendant and Lord were present; and Lord's statements were made in the hearing of both parties, and were adopted by the defendant. Lord's statements became the statements of the defendant; and the court took the view urged by plaintiff's counsel, that the testimony tended to prove a material fact. In the opinion of the court, Putnam, J., says: "Now, although it is a general rule that a party is not to be allowed to discredit his own witness, yet that must be understood to mean, that the witness is not directly to be impeached on account of his character for truth; but the rule is by no means to extend so far, as that a party may not call a witness to prove a *fact* which a witness previously called by him has denied. A party is not obliged to receive, as implicit truth, every thing which a witness called by him may swear to. If his witness has been false or mistaken in his testimony, he may prove the truth by others. Lord was called by the plaintiff from the necessity of the case, he being a subscribing witness. In his cross-examination, he stated that he was not interested with the defendant in the purchase. The plaintiff was desirous of proving to the jury, that Lord and the defendant were concerned together in the transaction; and Ormsby testified to declarations and conduct on the part of Lord, tending to satisfy the jury that he was interested in the affair with the defendant. We think the plaintiff was not bound by the answer which Lord made on his cross-examination, but might, by another witness, disprove the fact which Lord had stated." It needs no comment to show that the case has no application to the question under discussion. The right of a party to prove the previous statements of his witness at variance with his testimony, was not a ques-

---

Hurley v. The State.

---

tion in the case. The only question being, whether a party might prove a fact material to his case, which had been denied by a former witness called by him; and its citation by Mr. Greenleaf would seem to be a mistake.

The other case, *Rice v. Ins. Co.*, cited from 4 Pick. 439, does not appear to be in point. It decides that, "A witness having testified that he made a certain statement in a conversation with A, evidence was admitted, for the purpose of impeaching his credit in point of recollection, of his having made a different statement to B when A was not present." This impeaching testimony does not appear to have been offered by the party calling the witness. The contrary is to be inferred from the report of the case, because no objection was made to the testimony on the ground that it served to impeach the party's own witness; the objection being of an entirely different character, that is, that the conversation related to a wholly collateral fact, and, it was contended by counsel that a witness could not be cross-examined as to a collateral fact, for the purpose of contradicting him. This was therefore the ordinary case of a party impeaching his adversary's witness.

The case of the *Bank v. Davis*, 6 W. & S. 285, goes no further than to hold that, "Where a witness gives evidence against the party calling him, and is an unwilling witness, or in the interest of the opposite party, he may be asked by the party calling him, at the discretion of the court, whether he has not on a former occasion given different testimony as to a particular fact." The action was against the bank, and the plaintiff called the teller as a witness, who testified concerning certain checks. The plaintiff then asked the witness whether he had not on former occasions given different testimony respecting the genuineness of the checks. The question was objected to by the defendant, but permitted by the court. The witness answered the question, and the admission of this testimony was one of the errors assigned. The plaintiff then called Robt. M. Lee, who testified that the teller admitted the checks were forgeries. The court held that there was no error in permitting the plaintiff to inquire of the teller

whether he had not testified differently on a former occasion, but reversed the judgment for allowing Lee to testify to what the teller told him about the checks.

*The State v. Norris*, Haywood's Rept. (N. C.) is directly in point, and goes to the extent of holding that the state, in a criminal prosecution "may discredit its own witness by proving that the witness, on former occasions, had given a different account of the transaction, from that which he relates in court." This is the report of a trial for murder before Judges Williams and Haywood. It appears from the report, that Mrs. Thompson was called as a witness for the state, and testified to various facts concerning the homicide, some of which were not satisfactory to the prosecution. "The solicitor general then moved to have leave to introduce witnesses to prove a variance between what Mrs. Thompson had sworn in court, and what she had related in several conversations to others. He admitted the rule in civil cases was, that the party producing a witness should not afterwards be permitted to discredit that witness; but the rule had never been adopted as he knew of, in criminal cases." The court said: "The rule is so in civil cases, let authorities be produced to show how it is in criminal ones." The report states "the gentlemen on both sides searched for authorities, but none could be found." Thereupon the court allowed the witnesses to prove Mrs. Thompson's declarations, to be called. One witness said, in relating the story, she omitted several circumstances mentioned in her testimony. Two other witnesses called to support her credit, stated she told the story to them exactly as she now told it. In a note to this case, it is said that "public opinion ran very high against the prisoner, before and after the trial;" and it may be remarked, that this is not the decision of a reviewing court, but the report of the proceedings as they occurred on the trial, and that the ruling was made in the midst of the trial, with but limited opportunity for investigation, and upon the ground that no authorities could be found.

In addition to the foregoing cases cited in the note to Greenleaf's Evidence, counsel for the state refers to the following ones. *Hemingway v. Garth*, 51 Ala. 530; *Johnson v. Leggett*,

28 Kansas, 591; *Stearns v. Merchant's Bank*, 53 Pa. St. 490; *State v. Knight*, 43 Me. 11-134.

It is held in *Hemingway v. Garth*, that, "A party may ask his own witness whether he has not, on a former occasion, made statements inconsistent with his testimony on the trial." A witness called by the defendant was asked if he did not, on a former trial, swear to a different statement from that then made by him; but no attempt was made to prove by others that he did so swear, or that he made such different statement.

*Johnson v. Leggett*, was an action for breach of marriage contract. The defendant called a witness, by whom he expected to prove that in a conversation with her, the plaintiff denied there was a marriage contract. The witness, contrary to defendant's expectations, testified that in the conversation the plaintiff claimed there was a marriage contract. The defendant then offered a witness, to prove that the witness who disappointed him, stated on a former occasion, that the plaintiff in the conversation negatived such contract. This testimony was rejected by the trial court, and it was sought to reverse the judgment on that ground. But the Supreme Court of Kansas affirmed the judgment, holding that if a witness could be so impeached, it was a matter within the discretion of the court.

In *Stearn v. Merchants' Bank*, it is distinctly held that, "A party can not discredit his own witness by proving his contradictory statements upon other occasions, but must be restricted to proving the facts to be otherwise, by other evidence." The decision of the court is directly against the proposition in support of which the case is cited by the prosecuting attorney, and it is probable that it was cited on account of the dissenting opinion of Thompson, J.

The case of *State v. Knight*, shows that on the trial in a prosecution for murder, the state called as a witness, the prisoner's mother, whose testimony when taken alone was not inconsistent with the prisoner's innocence. The counsel for the state in his closing remarks to the jury, endeavored to show that the death of the deceased took

place contrary to the mother's statement; and, disclaiming any intention of impeaching the competency or credibility of the witness, he insisted, upon the other facts adduced, that she was mistaken and to show that this mistake was not unnatural, nor inconsistent with the most honest intention, he referred to her extreme age, her appearance before the jury, bowed down, deaf and decrepit, and to her having forgotten her own son who addressed her as mother. This course of argument was objected to by the prisoner's counsel, but permitted by the court, and that was the error complained of with regard to the impeachment of a party's own witness. Upon the question the court said, "That a party calling a witness can not impeach his competency or credibility, if his testimony turns out unfavorable to him, is well established. But it certainly would not tend to develope truth, to preclude a party from showing that his witness was honestly mistaken, and no such rule is recognized by law. The rule of law is, that if a witness proves a case against the party calling him, the latter may show the truth by other witnesses. \* \* \* The mother of the prisoner had made the statement of her knowledge of the transaction, which, counsel for the state insisted was founded on mistake, in some particulars, as shown by *other facts* and circumstances in the case. The evidence tending to show the mistake of the witness being properly before the jury, is the subject of legitimate argument." It is obvious that this case does not support the proposition to which it is cited.

In the note to sec. 444 of Greenleaf's Evidence, the reader is directed to compare the following cases with those cited to sustain the text: *Greenough v. Eccles*, 5 C. B. N. s. 786; *Reg v. Williams*, 6 Cox C. C. 343; *The Lochlibo*, 1 Eng. L. & Eq. 655; 3 *Rob. Adm.* 310; *Com. v. Hudson*, 11 Gray, 64, *People Safford*, 5 Denio (N. Y.) 112; *Bullard v. Pearsall*, 53 N. Y. 230; *Mc Daniel v. State*, 53 Ga. 258.

The case of *Greenough v. Eccles*, arose after the passage of the Common Law Procedure Act of 1853, (17 & 18 Vic.) sec. 22. chap. 12 of which provides that "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the wit-

ness shall in the opinion of the judge, prove adverse, contradict him by other evidence, or by leave of the judge prove that he has made at other times, a statement inconsistent with his present testimony ; but before such last mentioned proof can be given, the circumstances of the supposed statements, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statements." The only matter before the court being the construction and meaning of the statute, the case of course can have no important bearing on the question under discussion.

*Reg. v. Williams*, was a prosecution for manslaughter. One of the witnesses for the prosecution having testified that he saw nothing done to the deceased after he was on the ground, counsel for the prosecution proposed to put the deposition of the witness, on the coroner's inquest, into his hands. This was objected to, but Williams, J., said: "This very point was raised before me on the Welsh circuit, where a witness gave evidence different to what was expected. I thought it a point of some difficulty, but admitted it to be done on the ground of refreshing the memory of the witness ; and the court of Queen's Bench afterwards held that I was right." The syllabus of the case is: "Where a witness for the prosecution gives a different answer on examination in chief to that which was expected, his deposition before the coroner, or justices, as the case may be, may be put in his hands for the purpose of refreshing his memory, and the question then put to him. If the witness persists in giving the same answer after his memory has been so refreshed, the question may be repeated to him from the deposition, in a leading form." This is as far as the case goes, and is in strict accordance with the conclusion already announced upon the first question presented by the record in the case at bar.

*The Lochlibo*, was a proceeding in the High Court of Admiralty on behalf of the Aberfoyle, a vessel lying at anchor, against the Lochlibo, for running into her, and the chief defense was, that the Lochlibo had a licensed pilot on board who had the exclusive direction of the vessel. A witness

called in support of the plea, contradicted it. It was then proposed to prove that the witness had given the proctor an entirely different statement of the transaction from that sworn to on his examination. The court held the proposed evidence incompetent and excluded it. Dr. Lushington discusses the subject at length, and in the course of the opinion says that the rule in courts of common law is, "that if your witness upon being examined in chief, or cross-examined, even in that case, does depose utterly contrary to what might reasonably be expected of him, you shall be at liberty on the trial to adduce other witnesses, for the purpose of proving the facts which you originally intended to prove, and consequently, of necessity, by such evidence, negating that which the witness had so said." But, he says, "I should be most reluctant myself, unless the rule of law positively compelled and coerced me, at any time to admit the statement of a witness made to a solicitor or proctor, antecedent to the examination of a witness, and signed by him, for the purpose of contradicting that witness. It is, of course, the duty both of a proctor and solicitor, before they bring forward a witness for examination and produce him in the cause, to ascertain, as directly as they can, the testimony that witness is likely to give; but I have yet to learn that a witness is to be tied and pinned down by his signature before. I think it is for the interests of justice, and the only way to get at the truth, that a witness should go before the examiner to give his evidence, not tied down or coerced by any statement previously made to any solicitor or proctor in the cause."

In 3 Rob Adm. 310, there is no allusion to the subject under discussion.

*Commonwealth v. Hudson*, 11 Gray, 64, decides, that "A witness called by the commonwealth on a criminal trial, can not, upon being recalled by the defendant, be cross-examined by the district attorney upon his testimony before the grand jury." The indictment was for unlawfully selling intoxicating liquors. A witness for the prosecution testified that he drank liquor in defendant's shop but once. "The defendant, while putting in his defense, recalled the same witness, and

---

Hurley v. The State.

---

examined him only in reference to certain threats made in his presence and hearing against the defendant by another witness for the commonwealth, and to a debt from him to defendant." The district attorney on cross-examination, among other things in regard to the origin of this debt, and whether it was for liquor, put the question. "Did you not testify before the grand jury that you bought intoxicating liquor two or three times of Lewis in defendant's shop?" The witness answered that he did so testify. The defendant excepted to this testimony, and carried his exceptions to the Supreme Court, where they were sustained. Shaw, C. J., in the opinion remarked that the testimony could "only be to disparage the witness, by showing that he testified differently. The whole course of practice is otherwise in this commonwealth."

The conclusion of the court in the case of *People v. Safford*, 5 Denio (N. Y.) 112, is stated as follows: "We think that a party should in no case be allowed to give evidence for the sole purpose of impeaching his own witness. On this ground a party is precluded from giving evidence that his witness is of bad character, nor should he be permitted to give evidence of any description which can only tend to discredit the witness. \* \* \* Evidence that contradictory statements have been made by a witness, is only allowable with a view to his impeachment, a ground not open to the party producing the witness." The paragraph of the syllabus on this point is: "It is not competent for a party to discredit a witness called and examined by him, by asking him whether he had not made statements upon another occasion contradictory to the testimony which he had given."

*Bullard v. Pearsall*, 53 N. Y. 230, decides that "Where a party calling a witness is surprised by testimony contrary to his expectations, he may be permitted to interrogate the witness in respect to previous declarations, made by the latter inconsistent with his testimony, for the purpose of probing his recollection, and by showing the witness that he is mistaken, inducing him to correct his evidence, or by recalling to his mind the statements previously made, drawing out an explanation of his apparent inconsistency, and also for the pur-



pose of showing the circumstances which induced the party to call him, and such inquiries will not be excluded simply because they may result unfavorably to the witness. But where the sole effect of an affirmative answer to a question asked by a party to his own witness will be to discredit the witness, it is properly excluded." And in the opinion of the court it is added: "In case he (the witness) should deny having made previous statements inconsistent with his testimony, we do not think it would be proper to allow such statements to be proved by other witnesses; but where the questions as to such statements are confined to the witness himself, we think they are admissible."

The decision in *McDaniel v. State*, is founded on a statute of Georgia, which provides that a party shall not be permitted to discredit his own witness unless he first shows to the court that he has been entrapped by previous contradictory statements made by the witness. In construing this statute the court say, "It is not sufficient that he (the witness) shall have made contradictory statements; such statements must have deceived, and led the party complaining to introduce him, and thus, unwittingly, to have been damaged by statements different from what he expected. Under such circumstances, the law permits the party to violate that salutary rule which assumes, that one who brings a witness before the court, has, at least, confidence in his truthfulness."

From this examination, thus made at length, of all the cases cited in *Greenleaf's Evidence*, and referred to by counsel for the defendant in error, it appears that but one case is found among them, *State v. Norris*, *supra*, which can be regarded as an authority in favor of the proposition that a party may be allowed to prove the previous statements of his own witness, which are at variance with his testimony on the trial. To this case may be added the opinion of Lord Denman, and occasional dissenting opinions that may be met with in the reports.

Turning now to the authorities which deny the admissibility of such evidence, some of the leading works on evidence

---

Hurley v. The State.

---

may first be noticed. Dr. Wharton, in the last edition of his work on evidence, says: "By a settled rule of the English common law, while a party may contradict his own witnesses, though this may discredit them, he is not ordinarily permitted to impeach them, even though called afterwards by the opposite side, either by general evidence, or by proof of prior contradictory statements." "In this country," says the same author, "while a party can not ordinarily discredit his witness, his right to prove facts inconsistent with those stated by such witness is unquestioned, even though this discredit the witness materially; and he may examine the witness in advance as to such conflicting facts, arraying them, as it were, against him, though beyond this, in the way of impeaching the witness, the privilege does not go." 1 Wharton's Ev. sec. 549.

In Phillips on Evidence, the English cases are reviewed, and the arguments of Lord Denman in *Wright v. Becket*, *supra*, in favor of permitting a party to prove the previous contradictory statements of his own witness, are fully presented. The author concludes his discussion of the subject as follows: "It must be admitted, however, that the weight of modern authority is in opposition to the opinion, reasoning and arguments of Lord Denman above stated." 2 Phillips' Ev. p. 831 (5 Am. Ed.).

The subject is also discussed in Starkie's Evidence, where the English cases are also reviewed, and the conflicting opinions of Lord Denman and Baron Boland, in *Wright v. Becket*, are referred to, and that author says that "notwithstanding the reasons above suggested, the prevailing opinion seems to be that a party who calls a witness is not at liberty then to impeach his credit, and nullify his testimony." Starkie's Ev. p. 250 (10th Am. Ed.).

To the same effect is Taylor's Evidence, vol. 2, p. 951, sec. 1049, and Best on Evidence, sec. 645. These conclusions are fully sustained by the reported cases, as an examination of them will show.

*Regina v. Ball*, 8 Car. & P. 745, was a prosecution for assault with intent to murder. The case turned upon the identity of the prisoner, whom the prosecutor swore he had

---

Hurley v. The State.

---

never seen before the evening of the assault, when, he testified, he had seen him in the beer shop of Mrs. Sarah Turner. The prosecution then called Sarah Turner, who, in her evidence contradicted the prosecutor as to the fact of the prisoner having been at her house on the evening in question. In the course of the examination in chief, the counsel for the prosecution was permitted to ask the witness if she had been examined before the magistrate. She said she had, twice; that her statements had been taken down in writing, and that upon the last occasion she had signed the deposition; and she stated that she had then given the same account that she now gave in court. It was then proposed by the counsel for the prosecution to prove that the statements made before the magistrate were wholly inconsistent with the account given at the trial. Erskine, J.: "You can not put in evidence for the purpose of discrediting your own witness. You may call other witnesses to prove the facts denied by this witness, and incidentally contradict her, and show her to be unworthy of credit; but you can not call a witness, or give evidence not otherwise admissible, for the purpose of discrediting your own witness."

In the *People v. Safford*, *supra*, the conviction of the prisoner was reversed, solely on the ground that the trial court admitted evidence of the same character as that excluded by Erskine J., in the above case of *Regina v. Ball*.

In the case of the *Commonwealth v. Welsh*, 4 Gray, 535, it is held that, "A witness who has testified in chief that he does not know certain facts, can not, although he shows a disposition to conceal what he knows, be asked by the party calling him whether he did not on a former occasion swear to his knowledge of those facts." In the course of the opinion, Shaw, C. J., said: "The evidence of what the witness testified before the grand jury ought not to have been received. It bore upon no question pertinent to the issue. \* \* It could only be to disparage the witness, and show him unworthy of credit with the jury, which was inadmissible." The same rule was followed in the case of *People v. Jacobs*, 49 Cal. 384. On the trial of a prosecution for rape, a witness was called by the

---

Hurley v. The State.

---

prosecution to prove threats by the prisoner. The witness testified the prisoner made no threats, and the prosecutor was then permitted to call a witness who testified that in a conversation with him, the former witness stated the prisoner had made threats. For the admission of this evidence the judgment was reversed.

In *Melhuish v. Collier*, 14 Jur. 621, (15 Ad. & Ell. 69 Eng. Com. L. 877), it is held that "where a witness gives evidence adverse to the party who calls him, he may be asked whether he has not given a different account of the matter in question before the trial; but if the witness denies it, the person to whom he gave that account can not be called to contradict him;" and "where a witness gives evidence of a fact adverse to the party who calls him, other witnesses may be called to disprove the fact, if it be relevant to the issue in the cause." See also *Holdsworth v. The Mayor of Dartmouth*, 2 M. & Rob. 153; *Allay v. Hutchings*, *Ibid*, 358; *Winter v. Butt*, *Ibid*. 357.

This is the doctrine maintained by a long line of American cases, among them the following: *Thompson v. Blanchard*, 4 N. Y. 303; *Pollack v. Pollack*, 71 N. Y. 137; *Coulter v. Express Co.*, 56 N. Y. 588; *Nichols v. White*, 85 N. Y. 531; *Gadly v. Dyer*, 91 N. Y. 312; *Becker v. Koch*, 104 N. Y. 394; *Cox v. Eayres*, 55 Vt. 24; *Bauskett v. Keitt*, 22 S. C. 187, 197; *Burkhaller v. Edwards*, 16 Ga. 593; *B. & O. R. R. v. State*, 41 Md. 268; *Bullard v. Pearsall*, 53 N. Y. 230; *Stearns v. Bank*, 53 Pa. St. 490; *Queen v. State*, 5 Har. & John 232; *Adams v. Wheeler*, 97 Mass. 67.

Statutes, similar in their provisions to the English common law procedure act, have been adopted by Massachusetts, Kentucky, Georgia and some of the other states. The enactment of such statutes, is itself, a recognition of the necessity of a resort to legislation to accomplish the change in the rule thereby effected, and has been so regarded by the courts of the states where they have been adopted. The Kentucky statute on the subject is contained in section 660 of the civil code of procedure, which is also made applicable to criminal cases. It provides that "the party producing a witness may contradict

him by showing that he has made statements different from his testimony." The supreme court of that state, in the case of *Champ v. Commonwealth*, 2 Metc. (Ky.) 17, concerning that provision said that, "prior to the adoption of the code, a party who was surprised by the testimony of his own witness, was allowed to contradict him, only by proving that the fact stated in evidence was different. By the code as already shown, an additional means of contradiction is allowed—it may be shown that the witness has made statements different from his present testimony." In *Brooks v. Weeks*, 121 Mass. 433, Endicott J., in commenting upon the Massachusetts statute says; "Before its passage the witness could not be directly contradicted. The object of the statute is simply to allow the party to impeach the credibility of his witness by showing, in the manner pointed out, that he has made statements inconsistent with his testimony." And in *Ryerson v. Abington*, 102 Mass. 526, Gray, J., after quoting the statute proceeds as follows: "So great a change in the rules of evidence, giving so extensive a power to a party to introduce proof in contradiction and disparagement of a witness put upon the stand by himself, uncontrolled by the discretion of the judge before whom the trial is had, must be kept strictly within the bounds of the statute." An extract from the opinion of the court in the case of *McDaniel v. State*, *supra*, has already been given, showing the view taken of the subject by the supreme court of that state.

A diversity of reasons for their contention, are given by the advocates of the admissibility of evidence offered by a party to prove contradictory statements made by his witness. One is, that it should be admitted in order to set the party right before the jury; another, that it is necessary to prevent a party from being sacrificed by the contrivances of designing witnesses; and still another, that a party should have the same right to impeach his own witness, when his testimony is unfavorable to him, that he has to impeach his adversary's. The last one is chiefly urged by Jeremy Bentham in his *Rationale of Judicial Evidence* 70-79, and adopted by Mr. Appleton in his treatise on the *Law of Evidence*; but it has never received judicial

---

Hurley v. The State.

---

sanction, unless it be found in the opinions expressed by Lord Denman. The first of the reasons stated appears altogether insufficient. The object of judicial inquiry is to determine the truth of the issues. To be of any value, the evidence given should be relevant to the issues. Hence a party may prove any fact material to the issues, though such proof contradict and collaterally discredit his own witness; but he can not give evidence collateral to the issues, merely to contradict or discredit his own witness. It has never been claimed that such contradictory statements of the party's witness, are evidence of the facts so stated. What aid then, can their proof afford, in ascertaining the facts at issue?" If without such evidence the party must fail, he must certainly do so with it. The only difference is, that in the latter case, the party, in addition to having a cause which he failed to prove, would have a discredited witness, by whose testimony he attempted to prove it. It is obvious such testimony is wholly irrelevant unless it be competent by way of impeachment; and if one method of impeachment is open to the party calling the witness, no reason can be given why every legitimate means of impeachment should not be allowed him. The other reason assigned for the admissibility of this kind of testimony is, that without it a party might be sacrificed by the contrivances of an artful witness, who, it is said, might through collusion with the opposite party, or from other vicious motive, by favorable statements induce a party to call him and then testify against him, and in this way ruin his cause, unless proof of the previous statements of the witness be permitted. This is but an argument in favor of the party's right to impeach his own witness, for, it must be conceded that no other legitimate effect can be claimed from the proof of the contradictory statements than that of neutralizing the hostile testimony, by casting discredit on the witness. Yet while this is its only *legitimate* effect, the danger of sacrificing one party by admitting it, is not less than that of sacrificing the other by excluding it. It is not difficult to understand that the evil consequences to be apprehended from permitting the former statements of a witness, in contradiction of his testimony on the trial, to be proven

---

Hurley v. The State.

---

by the party calling him, may be quite as serious, and the apprehension as well grounded, as any likely to result from adhering to the rule as now established. A person might, from motives of spite or revenge, make statements against the accused in a criminal case, which, if true, would be sufficient to convict, for the purpose of having them communicated to the prosecutor, and thus procuring himself to be called as a witness; and if, when put upon his oath on the trial, he testifies truly that he knows nothing about the case, the prosecuting attorney were then allowed to prove the former statements of the witness, the jury might give them such weight as would turn the scale in a doubtful case, and the revenge of the witness would be gratified. Then, a party might operate upon a witness, by inducing him to make statements in his favor when not under oath, for the purpose of manufacturing evidence in his behalf, and if when examined by him, the witness should feel the obligation of his oath, and abandon his purpose to testify falsely, or be obliged to do so under cross-examination, the party who operated upon him would be prepared to destroy his credibility by proofs of the false statements he procured him to make, and thus not only prevent his being injurious, when he could not or would not be useful, but have whatever advantage such statements might give him to the jury. The rule that a party can not discredit his own witness, by proving that he had made statements at other times inconsistent with his testimony on the trial, is the result of long experience, and has been steadily adhered to by the courts of this country and of England. That the rule has generally operated favorably in judicial investigations, can hardly be questioned. If it be conceded it has not had that effect in every instance, as much may be said of many well established rules of law, and the general good result is to be regarded, rather than the particular inconvenience; and it may well be doubted whether it is not a sounder rule than that adopted by some statutes, which leave it within the unregulated discretion of each judge, to admit such, and only such testimony as may seem to him expedient.

---

Hurley v. The State.

---

For the error in admitting in evidence the statements of the witness, Roberts, at the coroner's inquest,

*The judgments of the courts below must be reversed, and the cause remanded for a new trial.*

MINSHALL, J., dissents from the second proposition of the syllabus and from the judgment of reversal. SPEAR, J., did not sit.

[NOTE.—The last four cases were decided before OWEN, C. J., retired from the Bench, but the opinions were not announced until afterwards.—Rep.]



CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF OHIO.

JANUARY TERM, 1889.

---

HON. THAD. A. MINSHALL, CHIEF JUSTICE.

HON. FRANKLIN J. DICKMAN,

HON. WILLIAM T. SPEAR,

HON. MARSHALL J. WILLIAMS,

HON. JOSEPH P. BRADBURY,

} Judges.

---

TAYLOR ET AL. v. Hiestand & Co.

46 345  
51 504

*Promissory notes—When interest payable semi-annually not usurious.*

A promissory note bearing interest at the rate of eight per cent. per annum, payable semi-annually, is not usurious, although it stipulates that the semi-annual installments of interest shall bear interest at the same rate if not paid when due.

(Decided February 26, 1889.)

**ERROR** to the Circuit Court of Preble County.

On May 9th, 1885, defendants in error began an action against plaintiffs in error, in the Court of Common Pleas of Preble County, on a promissory note secured by mortgage, a copy of which note, with the indorsements thereon, was set forth in the petition as follows :

“\$2,600.00.

EATON, O., March 13th, 1880.

“Three years after date we or either of us promise to pay to the order of H. C. Hiestand & Co. the sum of Twenty-six hundred dollars for value received, with 8 per cent. interest

(345)

---

Taylor *et al.* v. Hiestand & Co.

---

from date, the interest to be paid semi-annually, and in case said interest shall not be paid as the same fall due, then the interest to bear 8 per cent. ; and in case any intallment of interest shall remain unpaid for the period of twenty days after the same becomes due then the whole note is to become due and payable.

“ELIZABETH TAYLOR,

“MAXEY TAYLOR.

“Credits:

“Interest paid on this note to September 13th, 1880.

Interest paid on this note to March 13th, 1881.

Interest paid on this note to September 13th, 1881.

Interest paid on this note to March 13th, 1882.

Interest paid on this note to September 13th, 1882—\$104.00.

Interest paid on this note to March 13th, 1883.

Interest paid on this note to September 13th, 1883—\$104.00.

Interest paid on this note to March 13th, 1884—\$104.00.

Paid on the within note Twenty-six hundred dollars, (\$2,600.-  
00) March 5, 1885.”

To this petition the plaintiffs in error demurred, on the ground that the promissory note was usurious on its face, and for that reason fully paid by the payments set forth in the petition. The demurrer was overruled, and, plaintiffs in error not desiring to plead further, judgment was taken against them for \$213.86, the sum at the time due on the note if it was not usurious. This judgment was affirmed by the circuit court, and this proceeding brought to reverse both judgments.

*Gilmore & Holt*, for plaintiffs in error.

*Foos & Fisher*, for defendants in error.

BRADBURY, J. The contention of counsel for plaintiffs in error is, that the stipulation in the note that the semi-annual installments of interest, if not paid when due, should bear interest at the rate of eight per cent. per annum, renders it usurious on its face, and that therefore only six per cent. interest can be recovered in an action on it. If that view is

correct, the demurrer ought to have been sustained, for, then, the admitted payments would have satisfied the note. The first section of the act of May 4th, 1869, (66 Ohio L. 91), provides: "That the parties to any \* \* \* promissory note \* \* \* for the forbearance or payment of money at any future time, may stipulate thereon for the payment of interest upon the amount thereof at any rate of interest not exceeding eight per centum per annum payable annually." This statute was under consideration in *Cook v. Courtwright*, 40 Ohio St. 248, and the court there held, first, that a promissory note is not usurious though it contain a stipulation for the semi-annual payment of interest at the rate of eight per cent. per annum; and second, that the semi-annual installments of interest will bear interest at the rate of six per cent. per annum from the day they fall due, but form no part of the interest stipulated for "upon the amount of the note." This decision has become a rule of property, and we see no sufficient reason to disturb it now; and it furnishes a rule by which the rights of parties to this action can be ascertained. It establishes the doctrine that the payee of a promissory note may receive at the end of the year, as interest, a sum of money equal to eight per centum on the face of the note, with six per centum for six months on the first installment of interest added thereto. Therefore, the fact that it is apparent on the face of a promissory note that it will earn in any one year, as interest, a sum of money greater than eight per cent. on the principal sum, will not necessarily render it usurious. The court says in that connection (40 Ohio St. 251), "no part of that six per cent. interest would be interest upon the principal named in the note." This is equally true of the note here, and the only difference in this respect is, that in that case the unpaid installment bears interest at six per cent. and in this case at eight per cent. In either case the promissory note on its face earns more than eight per cent. per annum on the principal.

It is said, however, that in the case here, there is an express stipulation for interest on the several installments of interest as they respectively fell due, whilst in the case of *Cook v. Court-*

*wright, supra*, there was none, but that the installment bore interest by operation of law; and this distinction seems to have been in the mind of the judge who wrote the opinion in that case; but it does not appear to be the principle on which the case turned. The judge there must have referred to an express stipulation, for surely the interest on the installment in that case was the result of the stipulation for the semi-annual payments of interest. If there had been no such stipulation, there could have been no interest on interest. And it can not be important whether the interest on the installments resulted from an express stipulation for its payment, or necessarily, by operation of law, from another stipulation; in either case the result was apparent on the face of the paper.

It is not unlawful for a party to stipulate to do a thing, performance of which the law would compel him to make if no stipulation was made. Therefore, to expressly agree to pay six per cent. interest per annum on a semi-annual installment of interest would be lawful, although it might be useless. If this rate could be contracted for, why not a lower rate; and if a lower rate, why not a higher one, so the statutory limit of eight per cent. per annum on the sum, payment of which was forborne, was not exceeded? Take another view of the subject: If the first installment had been paid, it is clear that a new loan could have been made between the parties of the money at the rate of eight per cent. per annum. If it was not paid, a right of action to recover it would at once accrue to the payee; and we think it clear the parties would be clothed with full power, under the statute, to stipulate for its payment at a future day with interest at eight per cent. per annum. If this can be done after default made in the payment of an installment, no reason is apparent why the parties in the first instance might not anticipate and provide in advance for the contingency of a default. This we think may be done, and is what the parties to the note, in fact, did in the case before us.

*The judgment of the circuit court is therefore affirmed.*

Douglas v. Corry, Executrix.

## DOUGLAS v. CORRY, EXECUTRIX.

46	349
50	9
50	218
46	349
51	214

*Attorney—Collection of money by—Suit by client to recover—When statute of limitations begins to run—When not a “continuing and subsisting trust.”*

1. The receipt of money by an attorney, which it is his duty to pay over to his client, is not a “case of a continuing and subsisting trust” within the meaning of § 4974, Rev. Stats., excepting such trusts from the operation of the statute of limitations.
2. Where an attorney collects money for his client, and uses no fraud or falsehood to him in regard to its receipt, the statute of limitations begins to run from the time of its collection.
3. Where suit is brought by a client against his attorney for money collected and not paid over to him, and it appears on the face of the petition that the collection was made more than six years prior to the commencement of the action, and there is no averment of any misrepresentation or concealment of its collection by the attorney, the petition may be demurred to on the ground that the cause of action is barred by the statute of limitations.

(Decided March 26, 1889.)

## ERROR to the Circuit Court of Hamilton County.

The suit below was for the recovery of money collected by the defendant's testator as attorney for the plaintiff. The suit was commenced October 11, 1884; and the petition, omitting the style and verification, is as follows :

“The plaintiff says that the said Wm. M. Corry died in September in the year 1880, and that the said Antonia F. Corry is the executrix of the estate, duly appointed and qualified on the 6th day of October, 1880.

“That in the year 1867, the said Wm. M. Corry was acting as attorney of the plaintiff, and that he continued to act as her attorney for many years thereafter, and that while so acting as her attorney he received on the 1st day of September, 1867, the sum of three thousand seven hundred dollars, and two promissory notes for five thousand dollars each, the property of the plaintiff; and that subsequently on the 17th day of July, 1871, the said Wm. M. Corry, while acting as the attorney of the plaintiff, collected the said two notes of five thousand dollars each, with the accumulated interest thereon, and

---

Douglas v. Corry, Executrix.

---

receipted therefor on the mortgage for said money as the attorney of the plaintiff. That the said money was the proceeds of a sale of block No. 38, in Corryville, in Hamilton county, made to Washington McLean.

"That no offer to pay said money to the plaintiff was made, and thereafter in the year 1880, during the life of said Wm. M. Corry, the plaintiff demanded the payment of said money, which he then agreed to pay, but failed, and neglected to pay any part thereof.

"That on or about the 4th day of October, 1884, the plaintiff caused to be presented to the defendant, the executrix as aforesaid, a duly verified copy of the said account, and afterward, on the 4th day of October, 1884, the said defendant rejected the claim.

"Plaintiff says there is now due her from the defendant, Antonia F. Corry, as executrix of the estate of Wm. M. Corry, the sum of thirteen thousand seven hundred dollars, with interest thereon, from the 1st day of September, 1867, which she claims, and for which she asks judgment.

"S. A. MILLER,

*"Attorney for Plaintiff."*

The defendant demurred to the petition on the grounds (1) that the action is barred by the statute of limitations as appears on the face of the petition; and (2) that the petition does not state facts sufficient to constitute a cause of action.

The demurrer was sustained, and the petition dismissed; and this judgment was, on error, affirmed by the circuit court.

The plaintiff now prosecutes error in this court, and asks the reversal of the judgment in both of the courts below, on the ground that the common pleas erred in sustaining the demurrer to the petition.

*S. A. Miller, for plaintiff in error.*

*J. J. Glidden and T. A. O'Connor, for defendant in error.*

MINSHALL, C. J. The only question that arises upon the record is as to whether the claim stated in the petition is barred

by the statute of limitations. The money sought to be recovered was collected by the deceased while acting as the attorney of the plaintiff. No demand was made until over six years had elapsed after its collection. When the demand was made he promised to pay it, but failed to do so. The demand was made in 1880, and he died in the same year, the relation of attorney subsisting up to the time of his death. The claim was presented to the executrix in 1884, and rejected by her; whereupon suit was brought in a few days after, which was some thirteen years after the \$10,000 had been received, and seventeen years after the \$3,700 had been received.

The claim is certainly barred on the face of the petition, unless it can be brought within some exception to the rule of the statute of limitations. This is sought to be done on several grounds:

1. The first claim is that the relation of attorney and client being a confidential one, the duty imposed by the relation on the attorney gives rise to a continuing and subsisting trust in favor of the client, and is not within the statute. That there are such trusts is well recognized; but it is equally well settled that trusts of this character, are those technical and continuing trusts which are not recognized at law, but fall within the proper, peculiar and exclusive jurisdiction of a court of equity. This was decided in *Kane v. Bloodgood*, 7 Johns. Ch. 110, after a most elaborate examination of the authorities by Chancellor Kent; and the rule as there stated has generally been followed in this country. *Finney v. Cochran*, 1 W. & S. 118; *Glenn v. Cuttle*, 2 Grant Cas. 273; *Denton v. Embury*, 5 Eng. 228; *Fiemin, v. Culbert*, 46 Penn. St. 498. Storey Eq. Juris. § 962, Wood. Lim. 418.

The provision of our code of procedure excepting from the statute of limitations "the case of a continuing and subsisting trust" (§ 4974 Rev. Stats.) is simply an incorporation of this rule. The word "trust" is frequently used in a very comprehensive sense; and, as is well said in *Finney v. Cochran*, *supra*, to hold that the statute of limitations is not applicable to any case which may, even with propriety, be denominated a trust, would, in a great measure, defeat the plain and manifest in-

---

Douglas v. Corry, Executrix.

---

tention of the legislature. No equitable relief is required in this case ; and the remedy adopted is a plain action at law for money had and received, and is not then a case of a continuing and subsisting trust cognizable only in equity.

2. Again it is said that no action can be maintained against an attorney for money collected by him for his client, until it has been demanded ; and from this it is reasoned, and held in several cases, that no action accrues, and consequently that the statute of limitations does not begin to run, until the demand is made. It is true that it is generally held that an action can not be commenced against an attorney for money collected until a demand has been made by the client. *Taylor v. Bates*, 5 Cow. 376 ; *Ex parte Ferguson*, 6 Cow. 596 ; *Rathburn v. Ingalls*, 7 Wend. 320 ; *Cummins v. McLain*, 2 Ark. 402 ; *Stafford v. Richardson*, 15 Wend. 305 ; *Weeks Att'y-at-Law*, § 308 ; *Krause v. Dorrance*, 10 Penn. St. 462. It is not questioned that there may be such circumstances as will dispense with a demand ; and in Iowa it is held that the commencement of the suit is a sufficient demand. *Hollenbeck v. Stanberry*, 38 Iowa, 325.

But it does not follow, nor do the cases generally hold, that, where there has been no fraudulent concealment of the receipt of the money by the attorney, the statute does not begin to run until a demand has been made for its payment. The rule is general that in the absence of such concealment, the statute begins to run from the time the money was collected and should have been paid over. The rule as to demand is designed for the protection of the attorney against the annoyance of unnecessary litigation and costs. (*Walradt v. Maynard*, 3 Barb. 584, 586.) The client has it in his power, by making the demand, to commence the action at any time after the attorney has received the money and refused on demand to pay it over ; and, by delaying the demand, he can not prevent the running of the statute.

The cases in which the contrary has been held have generally been overruled. The case of *Staples v. Staples*, 4 Greenl. 532, is frequently cited in support of the claim that the statute does not begin to run until demand made. All



that was necessary to be determined in the case was whether the attorney could be garnished by the creditor of the client. This was pointed out in the subsequent case of *Coffin v. Coffin*, 7 Maine, 298, where, notwithstanding what was said in the previous case as to the necessity of a demand, it is expressly held that an attorney is liable to an action for money collected by him, in the same manner as any other agent, and without a special demand; and that the statute of limitations begins to run from the time he receives the money. This is sustained by *Glenn v. Cuttle*, 2 Grants Cas. 273, and *Stafford v. Richardson*, *supra*; *Wilcox v. Executors of Plummer*, 4 Pet. 172; Wood Lim. 41.

In *McDowell v. Potter*, 8 Barr. 189, it was held that the statute begins to run from the time the client has notice or means of knowing of the receipt of the money, and that the *onus* is on the attorney to prove such notice or means of knowledge. The case seems to have been followed in *Voss v. Bachop*, 5 Kan. 59, with this qualification, that in the absence of proof the court will presume both notice and demand in a proper and reasonable time. But the question could hardly have arisen in that case, so as to make its decision a precedent, as there had been, as found by the court, such misrepresentation on the part of the attorney as to the receipt of the money, as to delay the running of the statute until the fraud had been discovered by the client, which was not until a short while before the action was brought. The case, however, of *McDowell v. Potter*, must be regarded as overruled by the subsequent case of *Campbell, Adm'r v. Boggs*, 48 Penn. St. 524, reported *sub nomine Glenn v. Cuttle*, 2 Grant's Cas. 273. The latter was the case of an attorney in fact, but, as observed by the judge delivering the opinion, there is "no adequate ground for a distinction between attorneys in fact and attorneys-at-law. Diligence and skill in the collection, and promptness and fidelity in paying over monies, is required of both. It is reasonable, therefore, that they should have the same measure of protection from the statute of limitations." And it was there held, in an unusually well reasoned opinion, that where an attorney

---

Douglas v. Corry, Executrix.

---

collects money for his client, and uses no fraud or falsehood to him in relation to it, the statute commences to run from the time of the collection. The case was approved and applied in favor of an attorney-at-law in *Fleming v. Culbert*, 46 Penn. St. 498, where it is said that the previous case was a carefully considered one, and had not been questioned in the ten years that had elapsed since it was considered.

The holding that the statute does not begin to run until the attorney has given notice to his client of the collection of the money, because such is his duty, would seem to misconceive the reason and policy of the statute of limitations. It might with as much propriety be said that he could have protected himself by paying over the money, because that was as much his duty as to give notice of its receipt. The unreasonableness of the rule is not in any inconvenience that might attend compliance with it in the first instance, but in overlooking the difficulty that may be encountered, after the lapse of a great number of years, of proving that the notice was in fact given. This might be as difficult as to prove payment itself, if not more so. The policy of the statute is based upon the evanescent character of all testimony, and the consequent difficulty of making a defense to any claim, after the lapse of a number of years.

There is no averment in the petition of any misrepresentation or concealment of the collection of the money by the testator of the defendant; and it is well settled that where a plaintiff relies upon such facts to aid his case as against the statute, and it appears from the face of the petition that it would be otherwise barred, the facts constituting the fraud and the time of its discovery, must be averred in the petition, or it will be open to a demurrer. *Wood Lim.* 590; *Combs v. Watson*, 32 Ohio St. 228, and cases cited at 235; *Wood v. Carpenter*, 101 U. S. 135, and cases cited. It is said by Justice Swayne in the latter case, that, "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."

*Judgment affirmed.*

## EATON &amp; CO. v. DAVIDSON.

46	365
53	627

*Transfer of goods fraudulently obtained, in payment of a pre-existing debt.*

1. Where a purchaser fraudulently obtains goods from the owner, and transfers them to another in payment of a pre-existing debt, such pre-existing debt alone will not be a sufficient consideration to constitute the transferee a *bona fide* purchaser for value, as against the owner from whom the goods were thus obtained by fraud.
2. D. by false and fraudulent representations, purchased and obtained goods on credit from E. Shortly after the purchase, to-wit: on August 7, 1884, D. was insolvent, and on that day transferred the goods with other goods and merchandise to W. who, as a consideration for the transfer, cancelled and surrendered to D. an interest bearing note for \$3,000, made by D. himself to W., dated October 8, 1883, and due in one year from date.

*Held:* That W. was not a *bona fide* purchaser for a valuable consideration as against E.

(Decided March 26, 1889.)

ERROR to the Circuit Court of Williams County.

*Pratt, Wilson & Pratt*, for plaintiff in error.

An antecedent debt is not alone a sufficient consideration for the transfer of goods fraudulently obtained, so as to constitute such transferee a *bona fide* purchaser, as against the one from whom they were obtained by fraud.

*First*—As to the reason of the rule governing the transfer of commercial paper: *Carlisle v. Wishart*, 11 Ohio, 172; 16 Peters, 1; *Bozborough v. Messick*, 6 Ohio St. 448; *Bailey v. Smith*, 14 Ohio St. 396; *Ross v. Donald*, 29 Ohio St. 473.

*Second*—As to the rule governing the transfer of personal property other than commercial paper: *Dean v. Yates*, 22 Ohio St. 395; *Harnet v. Letcher*, 37 Ohio St. 356; *Combs v. Chandler*, 33 Ohio St. 178.

These cases establish the rule in Ohio, that in order to prevent a person from whom personal property had been obtained by fraud from recovering the same, it is necessary:

*First*—That he shall have intended to have parted with the title to the same; and,

*Second*—That the same has passed into the hands of an innocent purchaser for present value, and under such circum-

stances as to make it inequitable to deprive him of it; so that there is called into play the principle that where one of two innocent persons must suffer, etc.

This is far different from the rule applicable to the transfer of commercial paper.

The whole foundation of the rule of *bona fide* purchaser of personal property is equitable; it is founded upon estoppel. *Frost v. Lowery*, 15 Ohio, 200.

A person has the right to pay or secure one of his creditors, so he does it in good faith, though it takes all his property and leaves his other creditors with nothing. But he must do this with his own property, and not with the property of another. And property obtained by fraud, and without consideration, is not his property. *Lewis v. Anderson*, 20 Ohio St. 281; *Jewett v. Palmer*, 7 John. Chan. 68; *Padgett v. Lawrence*, 10 Paige, 180; Story's Equity, 398, note.

The transfer of personal property, obtained by fraud, in payment of a pre-existing debt, is not such a consideration as constituted such transferee a *bona fide* owner, as against the one so defrauded, who can recover the same from such purchaser. *Post v. French*, 13 Wend. 570; *Townes v. Treadway*, 53 N. Y. 650; *Weaver v. Barden*, 49 N. Y. 286; *Barnard v. Campbell*, 58 N. Y. 73; *Same v. Same*, 55 N. Y. 466; *Padgett v. Lawrence*, 10 Paige Ch. 170; *Beaver v. Lane*, 6 Duer, 232-240; *Sargent v. Strain*, 23 Cal. 359-362; *Williamson v. R. R. Co.*, 29 N. J. Eq. 311-319; *Hyde v. Ellery*, 18 Md. 496-401; *Stevens v. Brenan*, 79 N. Y. 254-258; *McLeod v. First National Bank*, 43 Miss. 99; *Prout v. Vaughn*, 52 Vt. 451; *Barrett v. White*, 34 Miss. 56; *Lynch v. Bucher*, 38 Conn. 490.

See also, *Stoutenborough v. Conkle*, 2 McCord, 33; *Hicks v. Campbell*, 4 C. E. Green, 183; *Ash v. Putnam*, 1 Hill, 302; *Morey v. Walsh*, 8 Cow. 238; *Hicks v. Cleveland*, 39 Barb. 573; *Devoe v. Brandt*, 53 N. Y. 452; *Load v. Green*, 15 M. & W. 216; *Clough v. R. R. Co. L. R.* (7 Ex.) 26; *Morrison v. Ins. Co., L. R.* (8 Ex.) 197; *Wiggin v. Doy*, 9 Gray, 97; *Clements v. Doerner*, 40 Ohio St. 632; *Bloom v. Nogle*, 4 Ohio St. 45.

*Pratt & Bentley*, for defendants in error.

The rules to be applied to a creditor buying in good faith, and absolutely, the property, real or personal, of his failing or insolvent debtor, in full and absolute payment of his just claim or debt, differ greatly from those of any other purchaser of such insolvent debtor's property. The creditor so purchasing his insolvent debtor's property, real or personal, is not bound to look out for or take care of any other creditor's interest, provided he takes no more of the debtor's property, real or personal, than will fairly but fully pay his demand at the fair value of the property; and takes such property in full payment of his demands, he may purchase any or all of his debtor's property, both real and personal, notwithstanding he knows of the insolvency of his debtor, and that the effect of said purchase will be to hinder and delay them in the collection of their debts, and to deprive the debtor of all means of paying such, his other creditors, and it cannot be said that one creditor is defrauded by the mere payment of another. *Overhouse v. Hart*, 21 Penn. St. 495; *Crawford v. Kirksey*, 55 Ala. The cases of *Dean v. Yates*, and *Hamst v. Letcher*, cited by plaintiff in error, decide that a party who obtain possession only of personal property by a fraudulent trick or device, and was clothed with no other rights therein, could confer no title on a third person.

The Supreme Court of the United States, in the case of *Swift v. Tyson*, 16 Peters 1, utterly annihilates the doctrine of the insufficiency of a pre-existing debt to sustain the making or transfer of a negotiable bill or note, under due, to a *bona fide* purchaser in the usual course of trade. See also *Carlisle v. Wishart*, 11 Ohio 172, which contains the doctrine in Ohio, and has been generally adopted in American Courts, as it had been ever, in England. See also *Roxborough v. Messick*, 6 Ohio St. 448.

The weight of authority seems to settle the principle that where the negotiable instrument of a third person is transferred before due, in payment of a pre-existing debt, and is *bona fide* received by the creditor, without notice, the defense as existing between the prior parties cannot be set up against such

holder. *Bonn v. Central Bank*, 2 Kelly (Georgia) Reports, 106; *Valette v. Mason et al.*, 1st Indiana (Smith's) Reports, 89; *Holmes et al. v. Smith*, 16 Maine, 177; *Williams v. Little*, 11 N. H. 66; *Reddick v. Jones et al.*, 6 Iredell, 107; *Swift v. Tyson*, 16 Peters, 1; *Brysh v. Scribner*, 11 Conn. 388 (where the English cases are reviewed); *Carlisle v. Wishart*, 11 Ohio, 172.

There is, therefore, no substantial difference between the consideration for the transfer of negotiable paper in payment of a precedent debt, or in payment of goods sold at the time of such transaction. *Combs v. Chandler et al.*, 33 Ohio St. 178; *Smith et al. v. Warman et al.*, 19 Ohio St. 145; *Clements v. Doerner*, 40 Ohio St. 632; *Shanklin v. Commissioners*, 21 Ohio St. 575; *Hook et al. v. Pryor*, 33 Ohio St. 19; *Riley et al. v. Anderson*, 2 McLean, 589; *Finley v. Pritchard*, 2 Sandf. 151; *Gould v. Sage*, 5 Duer, 266; *Iron Works v. Smith*, 4 Duer, 376.

The Ohio cited cases establish that it is not out of the ordinary course of business to pay a debt; that a pre-existing debt, more especially where securities for such debt are surrendered, is in all commercial transactions a valuable consideration, and that if the purchaser paying such consideration to the fair value of the property bought has no knowledge of the infirmities inhering in his vendor's title in the property sold him, whether real, tangible-personal, choses in action, or negotiable, or non-negotiable instruments, he must be considered a *bona fide* purchaser in the usual course of business for a valuable consideration without notice of defects in his vendee's title; and so, as having obtained a perfect title to the property bought. In *Riley et al. v. Johnson et al.* (8 Ohio, *supra*), a break was made to hold pre-existing debt not a valuable consideration in Ohio. Checked by McLean's decision on the other note, and by *Tyson v. Swift*, 16 Peters, 1, Ohio took the other line in *Carlisle v. Wishart*, and the repudiated doctrine has found no favor here since.

Our claims are abundantly supported by the following authorities: *Young v. Lee*, 12 N. Y. 551; *Day v. Saunders*, 1 Abb. 495; *Brown v. Leavitt*, 31 N. Y. 113; *Pratt v. Coman*,

37 N. Y. 440; *Clothier v. Adriance*, 51 N. Y. 322; *Patton v. Taylor*, 44 N. Y. 371; *Bank v. Crow*, 60 N. Y. 85; *Phoenix Ins. Co. v. Church*, 81 N. Y. 218; *Warner v. Link*, 5 Johns. 289; *Budsey v. Ray*, 4 Hill, 159; *Bank of Salina v. Babcock*, 21 Wend. 499; *Bank v. Scovill*, 29 Wend. 115; *Work v. Bratton*, 5 Ind. 396; *Wright v. Bundy*, 11 Ind. 398; *Babcock v. Jordon*, 24 Ind. 14; *Rowe v. Hanier*, 15 Ind. 445; *McKnight v. Knisley*, 25 Ind. 336; *Straughan v. Fairchild*, 80 Ind. 598; *Ry. Co. v. Bank*, 102 U. S. 14; *Lee v. Kemball*, 45 Me. 172; *Manning v. McClure*, 36 Ill. 490; *Butters v. Houghwout*, 42 Ill. 18; *Mix v. Bank*, 91 Ill. 20; *Stevens v. Campbell*, 13 Wis. 419; *Shufeldt v. Pease*, 16 Wis. 659; *Rice et al. v. Culler et al.*, 17 Wis. 363.

DICKMAN, J. During the years 1883 and 1884, Frederick Eaton, the plaintiff in error, was doing business as a wholesale dealer in dry goods and other merchandise at Toledo, Ohio, under the name and style of Frederick Eaton & Co.; and J. F. Davidson, during the same period, was engaged in business as a retail merchant, at West Unity, in Williams county, Ohio. Frank Davidson, a son of William E. Davidson, the defendant in error, had charge of the retail store at West Unity, was the confidential clerk and authorized agent of J. F. Davidson, bought all goods for his stock in trade, and had the general management of his business. On or about November 7, 1883 and at divers times thereafter down to and including April 24, 1884, J. F. Davidson, by and through the false and fraudulent representations of his agent and nephew Frank Davidson, obtained by purchase and on credit, a large quantity of goods and merchandise from Eaton, and the same became a part of the stock in his store. Although J. F. Davidson became cognizant of such fraudulent representations immediately after they were made, he did not repudiate them, but permitted Eaton to believe the same to be true, and to act upon them accordingly.

On August 7, 1884, J. F. Davidson was insolvent, and at that time was indebted to Frank Davidson, for wages, in the sum of \$370; to Isadore F. Webb in the sum of \$359.28, on

a note executed to Webb by himself and William E. Davidson as surety; to Belinda Grant in the sum of \$522.75, on a note made to her by himself and William E. Davidson as surety; and was further indebted in the sum of \$3,000, to his brother William E. Davidson, on his promissory note to him for that amount, dated October 8, 1883, and payable in one year after date, with interest. He also at the time owed Frederick Eaton, on the goods which he had purchased of him through Frank Davidson, a balance of \$1,156.63, with interest from June 5, 1884.

Being thus insolvent, J. F. Davidson, on August 7, 1884, proposed to William E. Davidson to transfer to him all the goods, wares and merchandise in his store at West Unity, if he would pay the Webb and Grant notes, pay Frank Davidson the amount due him, and cancel his own claim of three thousand dollars. The proposition was accepted—the contract was made—and J. F. Davidson turned the store and its contents over to William E. Davidson, who thereafter in pursuance of the agreement, cancelled his claim for \$3,000 and paid the claims of Isadore F. Webb, Belinda Grant and Frank Davidson.

It is conceded that the design of William E. Davidson in taking the stock of goods, was to secure himself from loss by reason of the note which he held for three thousand dollars, and to save himself harmless on account of his liability on the notes to Webb and Grant.

Shortly after August 7, 1883, Eaton discovered the fraudulent character of the purchases from him by J. F. Davidson, and thereupon demanded the return of the goods from William E. Davidson, who was then in possession of the same, which being refused, Eaton at once commenced the original action in replevin for their recovery. Under the writ of replevin the sheriff took goods and merchandise valued at from \$700 to \$900, but through mistake some goods were taken to which at the trial Eaton made no claim. The case was tried to a jury. A verdict was rendered for the plaintiff for all the goods replevied, except those taken by mistake, and as to them, the verdict was in favor of the defendant William



E. Davidson, assessing his damages at three hundred and fifty-five dollars and twenty-eight cents. Judgment was duly entered on the verdict, and the circuit court, on error, reversed the judgment.

The circuit court held that the court of common pleas erred in charging the jury as follows:

"But if you find that the consideration paid for such goods was in part the release of a pre-existing debt, owing by said John F. Davidson to said William E. Davidson, as to such part and parcel of the consideration it was not, as to so much of the purchase-price of said goods covered by said pre-existing debt, a valuable consideration such as would protect his title as an innocent purchaser, as to such part paid for by the release of such pre-existing debt; and to that extent, if you find the goods were fraudulently obtained from the plaintiff as claimed by plaintiff, then as to so much of said goods as were paid for in that way, the plaintiff would be entitled to your verdict."

And it was further held by the circuit court, that the court of common pleas erred in charging the jury, as requested by the plaintiff, as follows:

"But if the jury find that the defendant, William E. Davidson, so received said goods from John F. Davidson, sufficient in value to fully and fairly equal in amount the sum so assumed and paid by him, independent of the amount of goods replevied by plaintiff in this action, then the said William E. Davidson is not entitled to recover herein, except as to such goods as were not sold and delivered by plaintiff to John F. Davidson by reason of said fraud, if you find there was such fraud as is claimed by the plaintiff, or were so delivered and were subsequently paid for by said John F. Davidson."

We do not think that the court erred in giving these instructions to the jury, nor in giving or refusing to give the other charges to the jury as assigned for error in the circuit court.

The question to be determined in the case before us is, whether the defendant was a *bona fide* purchaser, for valuable consideration, without notice of the fraud by which his vendor

obtained the goods replevied in the action. As against his vendee, Eaton, who was induced to part with his goods by fraud, can not be defeated of his right to rescind the sale and reclaim his property.

But such right can not continue as against any one who purchases the property from the fraudulent vendee, *bona fide*, for value, and without notice. As a general rule, a person who has no title to property can convey none, but where one sells property to a fraudulent vendee, and clothes him with the insignia of ownership, the purchaser in good faith and for value from such vendee—being an innocent party no less than the original vendor who has been defrauded—may demand the application of the rule, that of two innocent persons, he must suffer who has placed the other in the power of the wrongdoer. In such case, the equitable rule will estop the first vendor from setting up his title.

But as said in *Barnard v. Campbell*, 58 N. Y. 79, "There is no good reason or equity in placing the burden of a fraudulent sale upon a *bona fide* vendor rather than upon a *bona fide* purchaser from the fraudulent vendee, unless the purchaser has parted with his money, or some value, upon the credit of possession or some evidence of title in the vendee, received from the original owner." In other words, the purchaser who would acquire an indefeasible title, if he buys from one who has obtained the property through fraud, must buy for an adequate, valuable consideration.

Such a consideration, in our judgment, was not given for the goods in controversy, purchased from J. F. Davidson by the defendant. In apportioning the consideration given by the defendant for the goods transferred to him August 7, 1884, it is proper that the sum at that time assumed and paid by him—amounting to \$1,251.98—should be applied to that portion of the stock of goods to which the transferee would acquire an undisputed title. After such application, there remained the pre-existing debt of \$3,000, in the form of a promissory note, applied as the consideration for the residue of the goods, including those replevied.

Where a fraudulent vendee transfers goods to a *bona fide* creditor in consideration of a pre-existing debt, no title is conferred as against the defrauded vendor, who may avoid the sale to the vendee, and recover the goods from the assignee or transferee. *Root v. French*, 13 Wend. 570.

In *Weaver v. Barden*, 49 N. Y. 286, the defendant received certain shares of capital stock in a corporation, partly in payment of a precedent debt and partly for a consideration paid at the time. The court in rendering its opinion said, that the situation of the defendant was in no respect changed by the transaction, and that he was not to be regarded a holder for value, so far as the assignment of the shares was received in part payment of the precedent debt. In *Sargent v. Sturm*, 23 Cal. 361, it is stated as the rule, that he who receives goods from a fraudulent purchaser in payment of a pre-existing debt against such fraudulent purchaser, can not hold them against the vendor. See also *Hyde v. Ellery*, 18 Md. 496; *McLeod v. First National Bank*, 42 Miss. 99.

If the consideration of the purchase from the fraudulent vendee is the release of a pre-existing debt, the purchaser will be restored to what he may have yielded up, if the original owner who has been defrauded reclaims and recovers the property. The consideration having failed, it will be the right of the purchaser to be placed in *statu quo*, and the courts, in the exercise of their remedial power, will be adequate to furnish him the needed relief, even though, as in the present case, there may have been a surrender of a promissory note. The purchaser will not, therefore, be materially affected in his legal rights, by the retaking of the goods by the original owner.

But, perhaps, it may be said, that although there was no new consideration in money or property, the defendant in surrendering the note for \$3,000, relinquished a personal security, and thus gave a valuable consideration for the goods claimed by the plaintiff in error. The surrendered note was without indorser, guarantor or surety, and while it furnished clearer evidence of the maker's indebtedness than a promise resting literally in parol, it was not equivalent to a new and

present consideration, but represented a pre-existing debt. It is undisputed, that to the extent of Eaton's recovery of his goods and merchandise, the defendant may have his appropriate remedy against the fraudulent vendee, J. F. Davidson; and although such remedy may be against an insolvent, the defendant's situation in that regard, will not be different from what it was when he surrendered the note of three thousand dollars.

The defendant invokes the doctrine of equitable estoppel as against Eaton, and asks that the property of which Eaton was defrauded, shall be applied in part payment of his claim. It is not contended, or even intimated, that the defendant was induced to lend money or give credit to J. F. Davidson, by reason of his ostensible ownership of the goods which the plaintiff had sold him, for the goods were not bought of the plaintiff until after the note of \$3,000, was executed to the defendant. The facts would rather serve to indicate, that J. F. Davidson purchased the goods on credit from the plaintiff, in view of probably transferring them to his brother, the defendant, in payment of pre-existing obligations. Applying analogous principles established in this state, in the voluntary transfer of a negotiable instrument as collateral security for a pre-existing debt, this court, in *Lewis v. Anderson*, 20 Ohio St. 281, held, that where there is no consideration for a mortgage of real estate, other than a pre-existing debt of the mortgagor, and the mortgagee is not induced thereby to change his condition in any manner, he can not be regarded as a purchaser for value, and therefore is not entitled to the protection against prior liens afforded in equity to *bona fide* purchasers, although he had no notice of such liens. If a pre-existing indebtedness was thus deemed an inadequate consideration from a mortgagee who held subject to the equity of redemption, still more so would it be from one who claims the absolute ownership of the property against all prior equitable lien-holders. "As a general rule," says Chancellor Walworth, in *Padgett v. Lawrence*, 10 Paige, 180, "a purchaser of the legal title, who receives his conveyance merely in consideration of a prior indebtedness, is not entitled to protection;

because he has lost nothing by the purchase." And in the same line of reasoning, Day, J., in *Lewis v. Anderson*, *supra*, says, "The equity in favor of a *bona fide* purchaser is based as much upon the idea that he parted with value on the credit of the land, as it is that he was ignorant of the infirmity of the title. Hence the rule is not available to a judgment creditor who has no notice of a prior equity, as he comes in under the debtor, and upon no consideration like a purchaser." The rule by which a pre-existing indebtedness of the mortgagor, as a consideration for a mortgage of real estate, would not be sufficient to constitute the mortgagee a *bona fide* purchaser for value, as against prior liens in equity of which he had no notice, may upon principle be extended to a transfer of personal property. By analogous reasoning it may be deduced, that a pre-existing debt will not be a sufficient consideration to constitute a purchaser of personal property fraudulently obtained by his vendor, a *bona fide* owner, as against the one from whom it was obtained by fraud.

In New York, the decision of the court of errors in the early and leading case of *Coddington v. Bay*, 20 Johns. 637, was re-examined by the same court in *Stalker v. McDonald*, 6 Hill, 93, and it was there declared as the principle established in *Coddington v. Bay*, that to protect the holder of a negotiable note which had been passed to him before maturity in fraud of the rights of others, he must not only have taken it without notice, but must also have parted with something of actual value, upon the credit or faith thereof; and that merely receiving it in payment of an antecedent debt, where by the settled rules of equity he would not be protected as a *bona fide* purchaser of property in other cases, was not sufficient. But in *Carlisle v. Wishart*, 11 Ohio, 172, it was held, that a precedent debt is a sufficient consideration for the transfer of a negotiable note before it falls due, to protect the holder without notice, against the equities of the original parties. And in *Roxborough v. Messick*, 6 Ohio St. 448, the opinion was expressed by the court, that the weight of authority seems to settle the principle, that where a negotiable instrument of a third person is transferred before due, in pay-

ment of a pre-existing debt, and is *bona fide* received by the creditor, without notice, the defense existing as between the prior parties, can not be set up against such holder.

The rule indeed is apparently settled, that an antecedent debt may be an adequate consideration in the transfer of negotiable instruments, when it would not be in a transfer of other personal property. The policy of the law is to facilitate the circulation of commercial paper, and thereby promote the interests of trade and commerce. Negotiable instruments are excepted from the universal principle with regard to other property, namely, that only he who has a title himself to a personal chattel can convey one to another. And the *bona fide* assignee for value of even a stolen note, who takes it innocently, in the course of trade, and not overdue, and under circumstances of due caution, will have a valid and complete title in it, although his transferer had no title whatever. 3 Kents' Comm. 79, and cases cited. "The necessities of the commercial world require that bills of exchange and promissory notes should possess some of the attributes of money and exchangeable value; and to clothe them with these attributes, and to give parties confidence in their reception, it is necessary to protect them in the hands of a holder for value, from defenses growing out of the dealings of the prior parties. The rule frequently operates harshly and unjustly, and being founded on commercial policy, is, therefore, applicable only where the interests of trade require it." Swan, J., in *Roxborough v. Messick*, *supra*. In *Weaver v. Barden*, *supra*, the court say, "The claim to distinguish between commercial instruments and other choses in action and property interests has been based upon the supposed interests of commerce and the necessity of giving the freest circulation to instruments so generally used in commercial transactions." "And why upon principle" says Mr. Justice Story in *Swift v. Tyson*, 16 Peters, 20, "should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and

.

advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts." See also *McLeod v. First National Bank*, 42 Miss. 112. Obvious reasons therefore are not wanting for the distinction between commercial paper and other property, when the consideration for an assignment or transfer of the same is an antecedent debt.

In our opinion the judgment of the circuit court should be reversed, and that of the court of common pleas affirmed.

*Judgment accordingly.*

---

POPE v. POLLOCK.

*Malicious prosecution of civil action—When actionable.*

An action may be maintained for maliciously, and without probable cause instituting and prosecuting an action in forcible entry and detainer.

(Decided March 26, 1889.)

ERROR to the Circuit Court of Hamilton County.

The action below was commenced July 3, 1885, by the filing in the court of common pleas of a petition which charged in substance that, in March, 1885, the plaintiff, by written agreement, leased of a Mrs. Brayton, through defendant as her agent, for a term to expire April 1, 1886, a lot in the county of Hamilton, on which was a dwelling-house and other buildings; that the plaintiff immediately entered into possession, which has since continued except that, during a portion of the time, the defendant unlawfully kept plaintiff out of a portion of the premises.

On the 11th of May, 1885, defendant, in her own name, instituted a suit in forcible entry and detainer, before a justice of the peace of Cincinnati township, said county, for the recovery of possession of said premises, which suit terminated in a verdict for the plaintiff of "not guilty."

48 367  
361 491

---

Pope v. Pollock.

---

Afterward, on the 17th of June, 1885, defendant instituted another like suit before a justice of the peace of Springfield township, said county, which also terminated in a verdict for this plaintiff of "not guilty."

Each of said actions was prosecuted maliciously, and without probable cause.

The plaintiff, by reason thereof, was greatly harrassed and annoyed, much worried and troubled in mind, was injured in reputation among his neighbors, was caused great inconvenience and much loss of time, and put to considerable money outlay in defending said actions.

Then follows a prayer for judgment.

To this petition a general demurrer was filed, which was sustained by the court of common pleas, which judgment was affirmed in the circuit court. To procure a reversal of these judgments, this error proceeding is prosecuted.

*Wm. H. Pope*, for plaintiff in error.

*John A. Shank*, for defendant in error.

SPEAR, J. Will the prosecution of a suit in forcible entry and detainer, which results in a verdict for the defendant, where the same is prosecuted maliciously, and without probable cause, afford ground for an action in the nature of a suit for malicious prosecution?—is the question in this case.

The more common causes for actions for malicious prosecution are groundless and malicious prosecutions of criminal charges. But that actions of this kind can be maintained where there has been an unjustifiable and malicious seizure of the property of the complaining party, as well as of the person, there is no question. Whether or not such an action may be maintained where there has been no deprivation of liberty, or of the possession, use, or enjoyment of property, has been the subject of much discussion, and of contrary holdings.

It appears that in England, by the common law, prior to the statute of Marlbridge, 52d Henry III. (1259), actions of this character were allowed, but since the passage of that stat-



ute, which gave the successful defendant judgment for costs against the plaintiff, the right to maintain such actions has been uniformly denied, it being held that if one prosecutes an ordinary civil action against another maliciously, and without reasonable or probable cause, an action for the resulting damage is not maintainable. So, too, in this country, many decisions of like tenor have been made. The courts have said that courts of law are open to every citizen, and that the costs which the defendant gets are a compensation for the wrong. If every suit may be re-tried on an allegation of malice, the evil would be intolerable, and the malice in each subsequent suit would be likely to be greater than in the first; and that if a defendant ought to have damages upon a false claim, then the plaintiff ought to have damages on a false plea, which would make litigation interminable. *Beauchamp v. Troft*, Keilw. 26; *Fitzherbert's Nat. Brev.* 429; 1 Bac. Abr. 141; *Savil v. Roberts*, 1 Salk. 14; *Buller's Nisi Prius*, 11; *Parker v. Langley*, Gilbert's Cas. 163; *Goslin v. Wilcock*, 2 Wils. 305; 1 Am. Leading Cases, 261, *note*; *Cooley on Torts*, 189; *Townshend on Slander and Libel*, sec. 410; *Taylor v. Wilson*, Coxe, 362; *Woodmansie v. Logan*, 1 Penn. (N. J.), 68; *Kramer v. Stock*, 10 Watts, 115; *Thomas v. Rouse*, 2 Brev. 75; *Ray v. Law*, 1 Pet. C. C. 207; *Potts v. Imlay*, 1 South. 330; *McNamee v. Minke*, 49 M<sub>C</sub>. 122; *Muldoon v. Rickey*, 103 Pa. St. 110; *Wetmore v. Mellinger*, 64 Iowa, 751; *Bitz v. Meyer*, 11 Vroom. 252; *Mayer v. Walter*, 64 Pa. St. 283.

Where such suits have been maintained, the right has been placed upon the ground that taxable costs, including, as in most states, but the fees of witnesses and officers of the court, afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit, and no remedy at all to repair the injury received. It is upon this principle, in part, that actions have even been sustained for malicious criminal prosecutions, in which no costs are taxed in favor of the accused. Where an action is brought and prosecuted maliciously, and without probable cause, it is an abuse of legal process, and the plaintiff asserts no claim in respect to which

---

Pope v. Pollock.

---

he has any right to invoke the aid of the law. It is a wrong to disturb one's property or peace; and to prosecute one maliciously, and without probable cause, is to do that person a wrong. The common law declares that for every injury there is a remedy, and to deny remedy in such case would violate this wholesome principle. The burden of establishing both malice and want of probable cause will prove a sufficient check to reckless suits of this character. When the plaintiff sets the law in motion, he is the cause, if it be done groundlessly and maliciously, of defendant's damage, and the defendant but stands upon his legal rights when he calls upon the plaintiff to prove his case to the satisfaction of judge and jury. *Van-duzer v. Linderman*, 10 Johns. 106; *Pangburn v. Bull*, 1 Wend. 345; *Whipple v. Fuller*, 11 Conn. 582; *Closson v. Staples*, 42 Vt. 209; *Marbrough v. Smith*, 11 Kans. 554; Bigelow on Torts, 2nd Ed. 71; *Smith v. Smith*, 56 How. Prac. 316; *Bump v. Betts*, 19 Wend. 421; *Woods v. Finnell*, 13 Ky. 628; *Hoyt v. Macon*, 2 Col. 113; *Payne v. Donegan*, 9 Bradw. 566; *McCardle v. McGinley*, 86 Ind. 538; *Juchter v. Boehm*, 67 Ga. 534; *Lawrence v. Hagerman*, 56 Ill. 68; *Atwood v. Marger, Style*, 378. See, also, an able review of the subject by Jno. D. Lawson, Esq., of the St. Louis bar. 21 Am. Law Reg. 281.

There seems, as will appear by reference to these citations, abundant authority in other states of the Union to support the proposition that a suit may be maintained for damages arising from the prosecution of an ordinary civil action, when the same is done maliciously, and without probable cause, but without disturbance to person or property. The precise question has not been made in Ohio, though in two cases (*Tomlinson v. Warner*, 9 Ohio, 104, and *Fortman v. Rottier*, 8 Ohio St. 548), this court has held that an action may be maintained for maliciously and without probable cause, suing out and levying a writ of attachment. So, when one has been wrongfully deprived of the use of his land by the prosecution, maliciously, and without probable cause, of an injunction proceeding, the court held (*Newark Coal Co. v. Upson*, 40 Ohio St. 17), that an action for malicious prosecution will lie. The language of the opinion, page 25, is: "It may now be consid-

ered the approved doctrine, that, an action for the malicious prosecution of a civil suit may be maintained, whenever, by virtue of any order, or writ, issued in the malicious suit, the defendant in that suit has been deprived of his personal liberty, or of the possession, use, or enjoyment, of property of value."

It will be noted that where damages for the prosecution, maliciously and without probable cause, of an ordinary civil action, are refused, one of the principal reasons given is, that the allowance of taxed costs is regarded sufficient punishment to the plaintiff for prosecuting, and recompense to the defendant for defending, such an action. In England, the taxed costs which may be awarded to a successful defendant, include not only fees of court officers and witnesses, but attorney's charges for preparing the case for trial and the *honorarium* of the barrister who tries it, and, in a number of American states, a like taxation of costs prevails. But in Ohio the successful party in an ordinary action recovers only the fees of witnesses and court officers, leaving his own personal expenses in preparing the case, in attending the trial, and his attorney's fees for preparation and for trial, to be paid without reimbursement. Taxed costs are not here regarded as affording full compensation for expenses incurred, for in cases where damages may be recovered for malicious injury, fees of counsel, as well as court costs, are included in compensatory, and not punitive, damages. The reason for the rule having failed, there is much ground for saying that the rule itself fails.

But there is no necessity in the present case for a determination of the question whether or not an action will lie for the malicious prosecution of an ordinary civil action, without probable cause, where there is no arrest or seizure, for the petition of the plaintiff makes a different case.

In many of its aspects, an action in forcible entry and detainer is an extraordinary proceeding. It is summary in its character, and may become, when prosecuted wrongfully, excessively annoying and harassing. Having given three day's notice in writing to leave the premises, the plaintiff may commence his action by filing a complaint with a justice of the

peace, and in three days more the trial may take place. (See sec. 6599, Rev. Stats., and following.) The complaint need not be sworn to. If a continuance is asked by defendant for more than eight days, security for payment of rent is required. The action may involve the possession, by a defendant, of a home for himself and a dependent family. A failure to answer, or unsuccessful defense, may result in immediate and forcible ouster, and this without reference to the condition of the family, or the weather, or other surrounding circumstances. No appeal is allowed, nor is one action a bar to subsequent actions. The contingency of preparing a bill of exceptions must be anticipated, and counsel procured for that; else a review of erroneous holdings cannot be had. Error can be prosecuted only by leave of a judge, and such proceeding raises questions relating to competency of evidence only, and not questions touching the weight or sufficiency of the evidence. The justice is not even bound to sign a bill where the objection is only that the judgment is not sustained by sufficient evidence. If petition in error is allowed to be filed, the party must be ready with security, if exacted, to stay execution of the judgment against him.

Then, too, the plaintiff may select from several concurrent jurisdictions within the county. He may commence his action, if he so desire, in the township farthest removed from the residence of the defendant, or the one most inaccessible, thus requiring, it may be, his adversary to travel long distances, and to transport his witnesses at large expense. Failing in one action thus brought, he may continue prosecutions until his pocket-book, or his malice, or both, become exhausted. Plainly, in the hands of an unscrupulous prosecutor, possessed of abundant means, this kind of action may become grievously oppressive, and it is idle to say that the small bill of costs before a justice is either a sufficient punishment to inflict upon a malicious prosecutor, or constitutes any recompense to a wronged defendant. The statute gives to such plaintiff the right to resort to his action as often as he may choose, and to bring it before any justice within the county, but this implies no right to prosecute maliciously and without probable cause.

A groundless action, prosecuted with malice, is never justifiable, and a wrong suffered by such prosecution in forcible entry and detainer should not be without remedy.

Nor is there force in the objection, as applied to this case, that intolerable evils would arise from a multiplicity of suits thus encouraged. The law-making power has seen fit to provide by this statute that a judgment shall not be a bar to any after action. We have, in this provision, legislative declaration to the effect that evils may not be expected to follow repeated trials of issues under this statute. In consonance with this policy, it may be reasonable to conclude that, if repeated actions to determine the right to possession will not work intolerable evils, a review of the facts by a suit for malicious prosecution will not have that effect. At all events, the right to so review will naturally tend to check any evils that might flow from a misuse of the statutory right to repeated trials.

*Judgment reversed.*

---

HILLS v. LUDWIG ET AL.

46 373  
58 400

*Error—When considered—Evidence—Rejection of—When error—Adjoining land-owners—Boundary lines—Uncertainty of—Petition in real actions—Amendment of after statute of limitations has run, not allowed.*

1. Where the error complained of in this court is that the trial court omitted to charge the jury a proposition of law involved in the case, and the court's attention was not directed to it except by one of a series of propositions, all of which the court refused to give, and the alleged error was not included in the motion for a new trial, or assigned in the circuit court for error, it will not be considered here, unless for some special or peculiar reasons, affirmatively appearing upon the record.
2. Where evidence, if admissible at all, is evidence in chief, and the party omits to offer it then, but, without explanation of the omission, offers it in rebuttal and it is then rejected by the trial court, this court will not pass upon its competency.
3. The acts and admissions of the grantor of lands, respecting a disputed boundary line, done or made by him after he has parted with his title, are not admissible against his grantee; and the rule is not changed, although he retains the ownership of other lands affected by the same

---

Hills v. Ludwig *et al.*

---

disputed boundary line, and his acts and admissions relate to his own lands.

4. Where the adjoining proprietors of lands adjust and settle a disputed boundary line between them, the agreement for that purpose need not be such as would of itself transfer title or right of possession to lands.
5. To enable adjoining proprietors to adjust and settle a boundary line between their lands, it is not necessary that the line should be so uncertain as to be incapable of exact ascertainment; it is sufficient if there is such uncertainty as leads to a *bona fide* dispute respecting its location.
6. Where the plaintiff in a real action omits to describe in his petition all the lands detained from him by the defendant, he can not by an amendment to his petition, made after the statute of limitations has run as to the land omitted, include such omitted land and have the amendment relate to the filing of the petition, so as to defeat the plea of the statute as to the lands brought in by the amendment.

(Decided March 26, 1889.)

**ERROR to the Circuit Court of Crawford County.**

On January the 11th, 1881, Solomon Ludwig, the defendant in error, began an action of ejectment against Jedediah Hills, the plaintiff in error, in the Crawford County Court of Common Pleas, to recover possession of a strip of land described in his petition. On April 23d, 1882, he filed in said action an amended petition to recover an additional strip of land described therein.

The defendant answered :

*First*—Denying, in substance, all the injuries charged against him.

*Second*—That the statute of limitations of twenty-one years had attached.

*Third*—That the true line between his lands and those of Ludwig was uncertain; that in the year 1860 an agreement was entered into by Ludwig, the plaintiff, and those under whom the defendant, Hills, claims title, to establish an agreed line, and that pursuant thereto a line was, in March of that year, established, to which the parties have since conformed.

*Fourth*—That at the time this line was established, the line on the west side of Ludwig's land being also uncertain, was, as a part of the same plan, also established in the same way,

giving to Ludwig the full quantity of land to which he was entitled; that Hills owns the land on the west as well as that on the east of Ludwig; that when Hills bought on the east of Ludwig he surrendered to him on the west side a strip substantially equivalent to the strip on the east side now in dispute, all which was done to adjust the lines pursuant to the said agreement, and that Ludwig claims and holds the strip on the west, while attempting, by this action, to recover the strip on the east.

The averments of the third and fourth defenses are put in issue by Ludwig in his reply.

Any further statement of facts necessary to a decision of the questions presented by the record, will be found in the opinion.

*S. A. Harris* and *B. Blakford*, for plaintiff in error.

*Finley, Eaton & Benne't* and *W. Z. Davis*, for defendant in error.

BRADBURY, J. The lands of Ludwig lie west, and those of Hills, east of the disputed line, and this line was originally identical with that between sections five and six in which the lands lie. This section line had been the subject of dispute between adjoining proprietors for many years prior to 1860. Early in that year an agreement was made between a number of land owners in those sections for a survey of this line, which survey, pursuant thereto, was made in March 1860, by Horace Martin, the then county surveyor. At the same time, and as part of the same plan, the north and south middle line of section six was surveyed. By this survey both lines were located further west than they were before, so that Ludwig gained thereby on the west, substantially the quantity of land he lost on the east. Soon thereafter Ludwig, Hills' grantors and some other adjoining owners, began to occupy and improve their lands according to the new line (which was called the Martin line), though with considerable dissatisfaction and some litigation between certain of the adjoining proprietors respecting it. Soon after this line was established, Hills purchased

lands lying east of and adjoining those of Ludwig, and also a tract adjoining Ludwig on the west, both of which he has continued to occupy and improve ever since, up to the Martin line. Twenty years and ten months elapsed from the time Ludwig went out of possession of the lands in dispute until this action was begun, and more than twenty-two years elapsed before the amended petition was filed. The trial resulted in a verdict and judgment for Ludwig for the recovery of all the lands described in his amended petition. Hills took a bill of exceptions which exhibits, among others, the facts above stated. It also discloses certain exceptions taken by Hills to the rulings of the trial court in admitting and rejecting evidence, and in charging and refusing to charge the jury certain propositions of law. The judgment was affirmed by the circuit court, whereupon the defeated party brought the case here for review.

Some of the interesting questions, argued by counsel for plaintiff in error, are not presented by the record in a way to enable this court to review them upon their merits. This is notably the case with respect to two important questions—alluded to by counsel for plaintiff, in his brief—that of estoppel, and that relating to the rejection of the evidence of Milliron, respecting the acts and admissions of the plaintiff below, Ludwig.

The question of estoppel is raised by the fourth defense. That defense, plaintiff in error claims, sets forth facts which estop Ludwig from asserting his title to the lands in dispute; or at least, that he ought not to be permitted to do so, even if he was honestly mistaken in supposing the Martin line to be the true one, until he first offered to yield up to Hills the equivalent therefor, which he still holds on the west side of his farm; and there is evidence tending to establish this defense. It is a grave question whether Ludwig can be permitted to repudiate the Martin line on one side of his land, where it cuts a strip from his farm, and cling to it on the other side, where it gives him a strip of land that otherwise would belong to Hills. The court said nothing to the jury on this question that is applicable to the facts as Hills claims



---

Hills v. Ludwig et al.

---

them to be, and there is nothing in the record to show whether it was considered by the jury or not. This omission, standing alone, does not constitute error, for which the judgment will be reversed by this court. *Taft v. Wildman*, 15 Ohio, 123; *Jones v. Ohio*, 20 Ohio, 34; *Schryver v. Hawkes et al.*, 22 Ohio St. 308; *Smith v. R'y*, 23 Ohio St. 10.

The defendant below, however, did request instructions on this point which the court refused to give to the jury; but these instructions, while fairly applicable to a state of facts testified to by Hills, were not, at least, fully applicable to the facts pleaded by Hills in his fourth defense; and for that reason the refusal was not error. In addition to this, Hills, when he requested the charge on this point, also requested the court to give to the jury eight other propositions of law, some of which being unsound, were properly refused; while others, containing sound legal propositions, should have been given to the jury if presented by themselves. All, however, were refused; but the exception thereto being general, it failed to point out to the court the error of which complaint is now made, and for that reason error can not be predicated on this action of the trial court. *Railway v. Probst*, 30 Ohio St. 104; *Everett Weddell & Co. v. Summers*, 32 Ohio St. 562; *Powers v. R'y Co.*, 33 Ohio St. 429.

It remains apparent, however, that the court did not instruct the jury on this point, notwithstanding its attention was called to the matter, though done through the medium of an instruction it was not error to refuse to give to the jury; and it may be said that the record raises the question whether it is error for the court to fail to give instructions on a question involved in the trial, when, by any means, its attention is directed to it. The record, however, does not disclose that this question was made to the trial court on the motion for a new trial, or to the circuit court on error, and there is nothing in this case that calls for us to disregard the general rule, that errors, not assigned in the courts below, will not be considered here. *Levi v. Daniels*, 22 Ohio St. 38. The rule applies with special emphasis to the case at bar, for the additional reason, that that omission is not especially assigned

---

Hills v. Ludwig et al.

---

in this court of error, but is insisted on in argument only, as an error appearing on the face of the record. We, therefore, hold that the question is not properly before us for review.

Respecting the evidence of the witness, Milliron, it may be said, that while, as a general proposition of law, the pertinent acts and admissions of a party are competent evidence against him, yet, unless they are offered at the proper time, it is within the discretion of the court to admit or reject them; and unless the record discloses an abuse of discretion, its action will not be reviewed on error. *Webb v. State*, 29 Ohio St. 351.

If, on the trial, Milliron's evidence was competent at all, it was evidence in chief for the defendant, Hills. He did not offer it then, and without explaining the omission, offered it in rebuttal; under these circumstances the action of the trial court in rejecting the evidence does not appear to be erroneous.

The trial court admitted in evidence, over the objection of Hills, the record of an action brought in 1865, by Rufus Page, against the plaintiff below, Ludwig. This action related to the north and south line (before referred to), that divided section six into half sections, and which was run and established at the same time, and was part of the scheme of the "Martin" survey. If that line had been placed too far west by the Martin survey, then the line in dispute had been also placed the same distance too far west. This record shows that Page, under whom Hills claimed title, alleged that the middle line of section six was too far west, and that he prevailed in the action. Now, this allegation and adjudication coming to the ears of the jury, could not be otherwise than prejudicial to Hills; and, if incompetent evidence, is error to his prejudice. It is not merely an admission, but a sworn statement made by one under whom Hills claims title, that the line is not where Hills claims it to be. Now, if it had been made while Page owned the land, especially if it related to the line of the land Hills afterward bought, it would have been admissible against Hills. But this was not the case; it related to other lands, and was made long after Hills had acquired his title. Page, at the time, had no interest in this land of Hills', and could

not, by any act, admission or statement, make evidence against Hills. It was therefore error to admit the record in evidence. For the same reasons the agreement between Page and Ludwig, and the record of the action between Ludwig and Frey, were incompetent evidence, and their admission erroneous.

The defendant below specially excepted to certain propositions contained in the charge of the court; these charges are properly before us for review and will now be considered.

Hills excepted to the rule laid down by the court respecting the method of retracing the line between sections five and six. This was an important question in the trial court, and might have been decisive, in view of the evidence then adduced; but we have no assurance that the evidence at the next trial will be the same that it was at the last one in this respect. This is a species of evidence peculiarly liable to change. A new line, run even by the same surveyor upon the same principle, may vary considerably from the former line run by him, according to the method approved by the court below. New corners may be found, or new lines run, or new facts discovered that would render the view this court might take wholly inapplicable; and, besides, the other principles laid down by the court are likely to be decisive of the rights of these parties.

The court charged the jury that the contract or agreement, by which a boundary line could be established, must be one "That would transfer the title or right of possession to defendant Hills." This was stating the rule too strongly against Hills. The second clause of the syllabus, in *Bobo v. Richmond*, 25 Ohio St. 115, reads: "The fixing of a boundary line by parol is not within the operation of the statute of frauds. No estate is thereby created; but where the boundary line is fixed by the parties they hold up to it by virtue of their title deeds, and not by virtue of the parol transfer." The language of the charge is calculated to impress the jury with the belief that an agreement to adjust and settle a boundary line must be one sufficient to transfer title or right of possession by its inherent force, independent of the acts of the parties pursuant thereto. This is contrary to the

syllabus above quoted. Hills did not rest his defense upon the agreement alone, but upon it and the acts of the adjoining owners, done pursuant thereto, and the charge ought to have been as broad as the defense in this particular.

The court also charged the jury that: "When the line between owners of land can not with certainty be ascertained, and said owners, in view of this, agree upon and establish a line, such an agreement settles the line." It is claimed in argument, that the defendant below was not prejudiced by this charge, even if it is incorrect, because no evidence was given on the trial, which tended to prove any such agreement. To this claim it may be said, that what the parties to this survey said and did, was before the jury, and it was competent for them to determine what their object was in causing it to be made. Ludwig claimed their purpose was to ascertain the true line; that he supposed they had done so; that he knew no better for many years thereafter; and that when he discovered the mistake he endeavored to correct it. Hills, on the other hand, claimed the purpose of the survey was not to find the true line, but to adjust and settle one which had long been the subject of contention, and about which there was then a dispute. This being the issue, the court, we think, placed the right of adjoining proprietors to adjust and settle disputed boundaries on too narrow a basis.

It is not essential that the disputed boundary line be incapable of ascertainment; but if it has become the subject of dispute and contention, and the parties with a view to settle the dispute, agree upon and adjust a line between their land, it is a finality and can not be disturbed—though they afterwards learn that the true line could have been found. *Avery's Lessee v. Baums Heirs*, Wright 576; *Walker v. Lessee of Devlin*, 2 Ohio St. 593.

This view is entirely consistent with the principle that where adjoining proprietors, in attempting to find the true line between them, by mistake fix upon an incorrect one, they may repudiate the spurious line on discovering the mistake, and occupy to the true line at any time before the statute of limitations has run.

---

The Lagonda National Bank v. Portner.

---

The court further charged the jury that "this action was commenced January 11th, 1881; it is conceded that was 20 years and 10 months after the plaintiff went out of possession of the premises, therefore the statute of limitations does not apply." This statement ignores the fact that part of the lands sought to be recovered were not described in the original petition. Over 22 years had in fact elapsed from the time plaintiff below went out of possession, before he filed his amended petition, so that, as to the land then for the first time included, the statute of limitations had attached, and the defendant's title made perfect by lapse of time, unless the amendment had a retro-active operation, and went back, by relation, to the original petition. This proposition, we think, is not supported by either reason or authority.

*Judgment reversed.*

---

THE LAGONDA NATIONAL BANK v. PORTNER.

---

*Check given for money lost at gaming—Absolutely void in hands of innocent holder for value—Sec. 4269 Rev. Stats. construed.*

The indorsee of a check given for money lost at a game of cards can not recover upon it against the drawer, though a *bona fide* holder for value without notice of the vice in the consideration. A check so drawn is within the provisions of § 4269, Revised Statutes, and "absolutely void and of no effect."

(Decided April 23. 1889.)

**ERROR to the Circuit Court of Hardin County.**

*J. Warren Keifer*, for plaintiff in error.

The plaintiff was entitled to recover upon the pleadings under our code of practice. Rev. Stats., sec. 5328; *Tootle v. Clifton*, 22 Ohio St. 247; *Buckingham v. McCrackin*, 20 Ohio St. 287; *Herman v. Kelly*, 14 Ohio, 502.

Giving the words used in the gaming act, their fixed meaning and legal signification, *bank checks* are not included in it. *Hurd v. Robinson*, 11 Ohio St. 232; *Morrison v. Bailey*, 5

## The Lagonda National Bank v. Portner.

Ohio St. 13; Story on Promissory Notes, (3rd Ed.), secs. 487 to 491; 2 Parsons on Notes and Bills, p. 5; *Merchants' Bank v. State Bank*, 10 Wall. 604; *White v. Ambler*, 8 N. Y. 170; *Terrill v. Auchauer*, 14 Ohio St. 80; Rev. Stats. U. S., secs. 3418, 3420-2; 2 Parsons on Notes and Bills, pp. 85-86, Edwards on Bills, p. 59; *State v. Peck*, 25 Ohio St. 26; *Grogan v. Garrison*, 5 Ohio St. 50; *Shultz v. Cambridge*, 38 Ohio St. 659; *Whiteman v. Chase*, 5 Ohio St. 528; Story on Promissory Notes, (3rd Ed.), sec. 489; *Baker v. Lawrence*, 27 Ohio St. 418; *Williams v. Coal Co.*, 37 Ohio St. 583; *Methurin v. Stone*, 37 Ohio St. 49; *Loudenback v. Collins*, 4 Ohio St. 251; *Bank v. Lane*, 8 Ohio St. 405; *Moore v. Vance*, 1 Ohio, 1; *Turney v. Yeoman*, 14 Ohio, 207.

The statute does not render absolutely void (even though bank checks were included in its terms) negotiable instruments, as against innocent parties. *Bailey v. Smith*, 14 Ohio St. 396; *Crawford v. Spencer*, 4 South Western Reporter, 713, Rev. Stats. 3171, 3173, 3174; *Bank v. Bank*, 10 Wall. 604; *Swift v. Tyson*, 16 Peters, 1; Story on Promissory Notes, sec. 498; *Burgett v. Burgett*, 1 Ohio, 469; *Brigel v. Starbuck*, 34 Ohio St. 280; *Miller v. Payne*, 1 Ohio, 251.

*F. C. & J. W. Dougherty*, for defendant in error.

There is only one question in this case, to-wit: Is the instrument sued upon void in the hands of a *bona fide* holder, under section 4269, Rev. Stats.?

We maintain the affirmative of this proposition, and in support of the same, cite the following authorities: Daniel on Negotiable Instruments, secs. 197 and 807, and numerous cases there cited.

It will be noted that section 4269, declares all contracts, promises, agreements, etc., "*absolutely void and of no effect.*"

MINSHALL, C. J. The action below was upon the drawing of a check by the defendant on the Kenton Savings Bank, payable to one Caldwell, or his order, for the sum of \$200. The plaintiff, the owner by indorsement, presented the check to the Savings Bank, for payment; payment was refused and

due notice given of non-payment. The defendant answered that the consideration of the check was small pieces of celluloid called "checks," representing money, betted and lost by him upon a game of chance played with cards. Any knowledge of this, as well as the fact itself, was denied in the reply. On the trial the court in substance charged the jury, as appears from the bill of exceptions, that though the consideration of the check was for money lost in a game of chance, the plaintiff would be entitled to recover, if it had no knowledge of the same; and, observing to the jury that it was conceded that the plaintiff was a *bona fide* holder without knowledge of the consideration for which the check had been given, directed a verdict for the plaintiff for the amount of the check and interest. The judgment rendered upon the verdict was reversed by the circuit court, and the object of this proceeding is to obtain a reversal of the judgment of the latter court.

It is provided in sec. 4269, Rev. Stats., that, "All promises, agreements, notes, bills, bonds, or other contracts, \* \* \* when the whole, or any part of the consideration of such promise, \* \* \* is for money, \* \* \* won or lost, \* \* \* upon any game, \* \* \* whatsoever, \* \* \* shall be absolutely void, and of no effect."

1. It is claimed that a check is not included in this statute. But this, as we think, will hardly bear serious discussion. A check is at least a contract, for it imports an agreement upon the part of the drawer to pay it if on presentment to the drawee it is not paid, and due notice is given him of such non-payment. The action below was upon the obligation so assumed, and the only support this obligation has is the consideration for which the check was drawn.

We do not, however, understand that the common pleas placed its judgment on this ground. It assumed, and so charged the jury, that the plaintiff could recover if he was an innocent holder for value, although the consideration for the drawing was money lost at cards. In this we think the common pleas erred, and that the judgment of the circuit court should be affirmed.

Notwithstanding the general tendency of courts to construe the word "void" as "voidable" only when used in statutes that affect contracts made in disregard of their provisions, yet where a public policy is to be subserved, as the suppression of usury or gaming, the settled rule is to give to the language employed its full force and effect. The rule with its limitations is thus stated by a very reliable author on the interpretation of statutes: "In general, however, it would seem that where the enactment has relation only to the benefit of particular persons, the word "void" would be understood as "voidable" only, at the election of the persons for whose protection the enactment was made, and who are capable of protecting themselves; but that when it relates to persons not capable of protecting themselves, or when it has some object of public policy in view which requires the strict construction, the word receives its natural full force and effect." Maxwell, *Interp. Stat.* 2d Ed. 256.

So, in *Bowyer v. Bampton*, 2 Strange, 1155, it was held that the innocent indorsee of a gaming note can maintain no action against the drawer, the statute, 9 Anne, c. 14, being, "That all notes, where the whole or any part of the consideration is money knowingly lent for gaming, shall be void to all intents and purposes whatsoever." The court said, "it is making it of some use to the lender, if he can pay his own debts with it; and it will be a means to evade the act, it being so very difficult to prove notice on an indorsee. And though it will be some inconvenience to an innocent man, yet that will not be a balance to those on the other side." And so in *Lowe v. Walker*, Doug. 736, which arose under the statute, 12 Anne, c. 2, § 16, making usurious contracts void, the action being by an indorsee of a bill against the acceptor, the indorsee having no knowledge of the consideration. Lord Mansfield, expressing a great leaning in favor of the plaintiff, said, "But the words of the act are too strong. Besides, we can not get over the case of the statute against gaming, which stands on the same ground. This is one of those instances in which private must give way to public convenience," and a recovery was denied.



In *Weed v Bond*, 21 Ga. 195, under a statute making void notes given an attorney where he fails to attend to the suit or procure some one to do so, a note so given was held void in the hands of an innocent indorsee, the attorney having failed to attend to the suit of the maker.

In *Groves v. Clark*, 21 La. Ann. 567, it was held that the third holder of a promissory note, given for the price of a slave, can not recover thereon, although he acquired the note in good faith, for a valuable consideration, before maturity, on the ground that "contracts for the sale of persons" are declared by the constitution of the state, "null and void."

This seems to have been the general construction placed upon statutes making void securities based upon a gaming consideration. *Pickaway County Bank v. Prather*, 12 Ohio St. 497, 509; *Hatch v. Burroughs*, 1 Woods's, 439, 448; *Taylor v. Beck*, 3 Rand. 316, 324; Story on Bills, § 189; 3 Kent Comm. 80 (13th ed.); Danl. Neg. Inst. § 807. •

The individual hardships that may arise in the enforcement of the policy of statutes of this kind, are regarded as less than the public inconvenience to be avoided by the suppression of the evils connected with the vice of gambling. Lord Mansfield observes in the case of *Lowe v. Walker*, that "It is less mischievous that the law should be as it is with respect to bills and notes, than other securities; because they are generally payable in a short time, so that the indorsee has an early opportunity of recurring to the indorser, if he can not recover upon the bill." Douglas, 744. And it seems to be well settled that one who can make out his title through a person other than the one who executed the instrument on the vicious consideration, may, if an innocent holder, recover from his indorser. Maxwell, Interp. Stat. 250; *Bowyer v. Bampton*, *supra*. So that in this case the plaintiff might, on giving due notice, have recovered from its immediate or any prior indorser of the check.

*Judgment affirmed.*

## HUFF v. AUSTIN ET AL.

*Explosion of steam boiler—Burden of proof.*

The plaintiff as an employe of F. & Co., was at work on the premises of the defendants, in helping to set up a saw-mill which the defendants had purchased of F. & Co. While so at work, a steam boiler, owned and used by the defendants on the premises to run the saw-mill, exploded and injured the plaintiff. *Held*: That in an action for damages, the mere fact of the explosion did not raise a *prima facie* presumption of negligence on the part of the defendants.

(Decided April 23, 1889.)

- ERROR to the Circuit Court of Logan County.

The facts are stated in the opinion.

*Kennedy & Steen, Butterworth & Crosley*, for plaintiff in error.

*E. J. Howenstein, West, Brown & West*, for defendants in error.

DICKMAN, J. On the 20th day of January, A. D. 1882, Chauncy F. H. Huff, the plaintiff, was engaged as an employe of Fay & Co., in locating and getting in working order on the premises of the defendants, Josiah Austin and James Morrison, a saw-mill which Austin had recently purchased of Fay & Co., the latter to furnish a man to help in setting up and getting the same in working condition. While engaged as such employe of Fay & Co., the plaintiff was injured in his person by an explosion of the steam-boiler owned and used by the defendants to run the saw-mill. The plaintiff brought his action in the court of common pleas, alleging that the explosion was caused by the defectiveness of the boiler and engine, and the carelessness of the defendants in managing and conducting the same, and claimed damages for the injuries he had suffered. A judgment was rendered in favor of the plaintiff, which judgment was reversed by the circuit court, and the cause remanded for error of the court of common pleas in instructing the jury as follows :

“If the plaintiff was without fault on his part, and was injured by the explosion of a boiler operated by the defendants, or their servant or agent, the mere fact of such explosion raises a presumption of negligence on the part of the defendants. This presumption is only *prima facie* however, and not conclusive; that is, the plaintiff will be entitled to recover on such presumption, unless the defendants, by a preponderance of evidence, show that they exercised ordinary care and prudence, that is, such care and prudence as is ordinarily exercised by men of ordinary prudence under like circumstances.”

The defendants had a right to place the steam-boiler on their premises. Used as it was to run the saw-mill, it was in no sense a nuisance. As an agent in the varied departments of industry, the steam engine has become a necessity in modern life. But though placed on one's own premises, the owner of a steam engine and boiler will be held responsible for his negligence, if he so operates the same as to injure one who comes lawfully upon the premises by invitation or permission. Though doing a lawful act upon his own premises, he will be liable for injurious consequences that may result from it to another, if it was so done as to constitute actionable negligence. In such case, there is a proper application of the rule that one should enjoy his own property in such manner as not to injure that of another person.

But the existence of negligence is an affirmative fact, and the presumption is, until the contrary appears, that every man will perform his duty. There is a general disposition among men to preserve their property, and avoid difficulty and danger, and escape the liability to which the want of care and diligence would naturally subject them. Ordinarily, these motives will secure on the part of the proprietor of machinery impelled by steam, and the engineer in charge of such machinery, that degree of skill and attention which the safety of the public demands. In view of such presumption it is the general doctrine, as sustained by a great weight of authority, that when negligence is the ground of an action, it devolves upon the plaintiff to trace the fault for his injury to the defendant; that he must give some affirmative evidence from

---

Huff v. Austin et al.

---

which there may be a logical inference of negligence, and the mere happening of an accident will not be sufficient evidence of negligence to be left to the jury. See Whart. on Neg. 2d Ed. § 421, and cases there cited.

It is contended however, that the defendants are responsible in the first instance for the immediate consequences of the bursting of the steam boiler in use on their premises, irrespective of any further question as to negligence or want of skill on their part, and that the accident, in the absence of explanation, is, of itself, evidence of negligence. It is urged that, where the instrument or machinery is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. But instances are not unfrequent of steam-boiler explosions where there has been no want of ordinary care and skill in their management, and even where there has been the greatest care; and explosions of steam-boilers have happened, of so mysterious a character, that they could not, with confidence, be assigned to any known cause. Considering the extent to which the agency of steam is now so necessarily and usefully employed, we are not prepared to hold that, the owner of a steam-boiler used on his premises, shall be deemed virtually an insurer against all damage and injury to person or property resulting from an explosion, unless, in the event of an accident, he assume the burden of proving that there has been no fault or negligence on the part of himself or his agents.

In the early case of *Spencer v. Campbell*, 9 W. & S. 32, a man drove a horse to defendant's steam grist-mill to obtain a grist, and was thus lawfully upon defendant's premises, and was as much entitled to protection there as if he had been upon his own premises. While there the steam-boiler exploded and killed his horse, and the action was brought for the value of the horse. It was held, that to entitle the plaintiff to recover, he was bound to show the want of ordinary care, skill and diligence.

In *Losee v. Buchanan et al.*, 51 N. Y. 476, there was an extended review of authorities. The action was brought to recover damages occasioned by the bursting of a steam-boiler, while the same was owned and being used by the Saratoga Paper Company, one of the defendants, at their mill. The boiler, by means of its explosion, was projected and thrown upon the plaintiff's premises, and through several of his buildings, thereby injuring and damaging the same, and destroying personal property therein. The case sustains the doctrine, that the owner of a steam-boiler, who operates and uses the same, in carrying on his business upon his own premises, in such a manner that it is not a nuisance, is not liable for damages done to the property of his neighbor by an explosion of such boiler, without affirmative proof of negligence on the owner's part.

Earl, C., in commenting upon *Spencer v. Campbell, supra*, says: "I am unable to see how that case differs in principle from the one at bar. To sustain the broad claim of the plaintiff here, it should have been held in that case that the owner of the steam-boiler was absolutely liable, irrespective of any care, skill or diligence on his part, for any damage which the boiler by its explosion occasioned to any property lawfully in the vicinity. Within the rules laid down by these authorities, the defendants in this case could not, without proof of negligence, be made liable for injuries caused to the persons of those who were near at the time of the explosion; and it would be quite illogical to hold them liable for injuries to property, while they were not liable for injuries to persons by the same accident." See also *Marshall v. Wellwood*, 38 N. J. L. 339.

*Walker v. Chicago, Rock Island & Pacific R'y Co.*, 71 Iowa, 658, is a comparatively recent case, illustrative of the principle that, the accident itself did not furnish a *prima facie* presumption of negligence against the defendant. A car of dynamite standing in the yard of the defendant railroad company awaiting the orders of its owner, took fire and exploded. The plaintiff sued for damages for the consequent injury to certain buildings, averring that the dynamite was not properly

protected; that the fire had caught from a passing engine; and that the car was negligently permitted to stand in an improper place. At the time of the fire the car stood on the outer track at the south side of the yard, and the wind was blowing from the south. There was no evidence that the fire had caught from passing engines, or that they were defective in their machinery for protection against fire escaping therefrom. There was no evidence that the dynamite was not properly protected, nor that the damage would have been less if the car had been standing at any other place in the yard. It was held, that the burden of proof was on the plaintiff to show that the car stood in an improper place, and that there was no evidence of negligence to go to the jury. The court say: "The relation between the parties to the action is not such that the law presumes negligence in the defendant by the mere fact that the plaintiff's property was injured. The burden was on the plaintiff to show that the place where the car was stored was an improper place. All the light the jury had on this subject was that the car exploded, and the plaintiff's property was injured."

Whether the defendants can be held liable for the injury caused by the explosion of the boiler owned and used by them on their own premises, without affirmative proof of negligence beyond the mere fact of the explosion, is not to be determined by the rule of negligence governing common carriers of passengers and goods. The carrier of goods is an insurer, unless his extraordinary responsibility is limited by special contract. And the carrier of passengers, while not an insurer of their safety, is bound to the observance of the utmost care and diligence for their safety, and is responsible for any, even the slightest neglect. "When carriers undertake to carry persons by the agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence, in such cases, may well deserve the epithet of "gross." Grier, J., in *Phil. & Read. Railroad Co. v. Derby*, 14 How. (U. S.) 486. By reason of the reliance for personal safety, of passengers upon the carrier, and of the high degree of care and diligence which the law requires towards those

with whom there is a relation of trust and confidence, courts have held that, the fact of injury having been suffered by any one while upon a railroad company's train as a passenger should be regarded as *prima facie* evidence of the liability. *Railroad Company v. Mowery*, 36 Ohio St. 418. But as to the presumptive liability even of common carriers for injuries caused by boiler explosions, congress, to remove doubt and uncertainty as to such liability, deemed it necessary to provide by sec. 13 of the act of July 7th, 1838, 5 U. S. Stat. at Large, 306, "that in all suits and actions against proprietors of steamboats, for injuries arising to person or property from the bursting of the boiler of any steamboat, the fact of such bursting shall be taken as full *prima facie* evidence, sufficient to charge the defendant or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment." The provision in the act of congress was subsequently repealed, but whether in full force or not, there was no such relation between the plaintiff and defendants herein, as exists between common carriers and passengers, and reported cases determining the liability of common carriers for injuries to passengers under their care, furnish no appropriate rule of decision in the case at bar.

*Judgment affirmed.*

46	391
51	480

### POSEGATE v. SOUTH ET AL.

*Will—Devise of personalty to wife, with unconsumed remainder to heirs—Estate of widow therein—Duty of executor under the will.*

A testator bequeathed all his personal estate, after the payment of his debts and funeral expenses, to his wife, and at her death, "said personal estate, or so much as shall be unconsumed, to be equally divided between" his heirs, naming them. The wife survived the testator, and accepted the provision made for her in the will. The executor paid the debts and funeral expenses, and delivered the balance of the personal estate to the widow, and settled his accounts accordingly. The will did not require or direct the executor to collect or distribute the personal estate that might be left unconsumed at the death of the widow, or enjoin upon him any duty with respect thereto. *Held:*

---

*Posegate v. South et al.*

---

1. After the debts and funeral expenses were paid, the widow became entitled to the possession, use and enjoyment of the personal estate, with the right to consume the whole or any part of it; and it was the duty of the executor to deliver possession thereof to her.
2. When the executor performed that duty, he administered the estate and executed his trust, and can not be held responsible for any use or disposition made by the widow, of such personal estate after it so lawfully came to her possession; nor, can he thereafter be required to account therefor in the probate court.

(Decided April 23, 1889.)

**ERROR to the Circuit Court of Clinton County.**

On the 25th day of March, 1885, Benjamin F. South and Charles P. South filed their motion in the Probate Court of Clinton County, for a citation against Isaac N. Posegate, executor of the last will and testament of Charles Posegate, deceased, to compel him to render an account. On the same day, the executor appeared, and answered that on the 6th day of August 1870, he made a final settlement of his trust, in said court, on which settlement there was found to be then remaining in his hands, a balance of eight thousand one hundred and forty-six dollars, after the debts and expenses of administration were paid, which balance he then, in accordance with the last will and testament, turned over to Ann Posegate (the widow of the testator), who died in 1877, but who, before her death, consumed and disposed of the same, except enough to pay the expenses of her last sickness and funeral.

This answer appears to have been treated by the probate court as an account, and Benjamin F. and Charles P. South filed exceptions to it; the ground of the exceptions being, as stated in the record, "that at the time of the death of Ann Posegate, to-wit: April 29th, 1877, said executor received and had in his hands, as such executor, the sum of eight thousand dollars, and that he still retains the same," and it was asked that he might be charged therewith, together with interest thereon. Upon the hearing, the probate court proceeded to state an account for the executor, and found there was in his hands the sum of four hundred and eighty-two dollars and eighty-five cents, which the executor was ordered to pay



to Benjamin F. and Charles P. South, in equal proportions. From this order of the probate court, the two Souths took an appeal to the court of common pleas, which, on the trial there, found that the estate of Charles Posegate had been fully settled, and distribution thereof made in conformity to the last will and testament, and rendered judgment against the appellants for costs.

A bill of exceptions was taken, from which it appears that "the following state of facts was agreed upon by the parties, and given to the court as testimony :

"That Charles Posegate, in the month of March, 1860, about the 19th day thereof, having four children, to-wit: I. N. Posegate, Mary Ann Woodmansee, Martha McKibben and Sallie South, made a will as to his personal estate, devising same to his wife, Ann Posegate, during her life, and at her death to be equally divided among the four children above named, and appointing I. N. Posegate executor of said will. Sallie South died April 4th, 1861, leaving Charles. P. South and Benjamin F. South, her only children and heirs at law. Charles Posegate died July 17th, 1869, leaving a widow, Ann Posegate, and the above named I. N. Posegate, Mary Ann Woodmansee, Martha McKibben, and the above named children of Sallie South, his only heirs at law.

"Ann Posegate died April 29th, 1877. At the death of Charles Posegate, I. N. Posegate qualified as executor, and proceeded to settle his estate. After making full settlement, and paying all the liabilities of said estate of every kind, there remained in his hands the sum of \$8,146.00, in money and notes, which he handed over to his mother, and she retained \$746.00, the money on hand, and divided the rest between I. N. Posegate, Mary Ann Woodmansee and Martha McKibben, giving to I. N. Posegate \$3,800, his one-fourth and Sallie's one-fourth, and Mary Ann Woodmansee and Martha McKibben \$1,800 each, same being one-fourth to each, for which they gave her their notes, and paid her interest on the same as long as she lived."

It also appears from the bill of exceptions, that in the life time of the testator, Isaac N. Posegate, for a consideration

---

*Posegate v. South et al.*

---

of six hundred dollars, purchased from Mrs. South her claim in the personal estate of her father, and took from her and her husband, a receipt acknowledging such purchase, and full payment therefor.

The will of Charles Posegate, which was duly probated, and is made part of the bill of exceptions, omitting its merely formal parts, is as follows:

"First—It is my will that all my just debts and expenses of my last sickness and funeral expenses be paid.

"Second—I give and devise to my beloved wife, Ann Posegate, in lieu of her dower, all my personal and chattel estate of every description that may be in my possession at the time of my death, after paying my debts and funeral expenses.

"Third—At the death of my said wife, the said personal estate, or so much as shall be unconsumed, to be equally divided between my lawful heirs, to-wit: Isaac N. Posegate, Mary Ann Woodmansee, Martha McKibben and Sarah Jane South.

"Fourth—I do hereby nominate and appoint Isaac N. Posegate executor of this, my last will and testament, hereby authorizing and empowering him to compromise, adjust, release, and discharge in such manner as he may deem proper, the debts and claims due me."

The circuit court reversed the judgment of the court of common pleas, on a petition in error prosecuted by Benjamin F. and Charles P. South, and the executor, Isaac N. Posegate, prosecutes error to this court to obtain the reversal of the circuit court.

*Telfair & Telfair*, for plaintiff in error.

*J. M. Kirk*, for defendants in error.

WILLIAMS, J. The questions chiefly argued in the case, relate to the validity of the transfer by Mrs. South, of her expectancy in the personal estate of her father, to her brother Isaac N. Posegate. The defendants in error contend, that the attempted transfer is inoperative against them, *first*: because Mrs. South was, at the time, under the disability of coverture;

and *secondly*: her father being then living, her interest in his estate was incapable of transfer. It is also claimed that Mrs. South having died before her father, her children, by force of the statute, (sec. 5971 R. S.) took directly under the will, and not from her.

Unless, however, at the death of the widow, it became the duty of the executor to collect and distribute the unconsumed personal estate given her by the will, an account thereof could not be enforced against him in the probate court; and whether such duty devolved upon the executor in the execution of his trust, is naturally the first question demanding consideration.

No statutory election by the widow to take under the will of her deceased husband, is shown by the record. It discloses however, that she actually accepted the provision made for her in the will, by receiving, using, and controlling the property bequeathed to her, as fully as she could, if she had appeared in the probate court for that purpose, and declared her election, which is the equivalent of an election made in conformity to the statute. *Baxter v. Bowyer*, 19 Ohio St. 490. The bequest contained in the second item of the will, is absolute, and, unaffected by any other provision of the will, would vest in the widow, the unqualified ownership of the property bequeathed to her. If it be conceded, that the third item, which, at her death, gives the personal estate, or so much thereof as shall be unconsumed, to the testator's children, so qualifies the previous bequest, as to reduce the estate given by it to the widow, to one for life, it must also be admitted, that it is a life estate with the right to the possession, use, enjoyment and consumption of the property by her, without restriction, either upon the mode of its use and enjoyment, or the extent of its consumption; for, it is only so much as shall remain unconsumed at the death of the widow, that is given over to the children, and no limitation is found in the will, upon the nature of the use to which she may subject the property, and her power to consume it is uncontrolled. Such right of use, enjoyment and consumption, necessarily implies the right to the possession of the property, since, without its

possession, it could neither be used, enjoyed or consumed. The duty of the executor, under the will, therefore was, after the payment of the debts and funeral expenses of the testator, to deliver possession of the personal estate to the widow.

It may be, that a court of equity, would have compelled the widow to furnish the legatees of the remainder, an inventory of the property received by her from the executor ; and, that a proceeding might have been maintained by them against her to require security against its improper disposition, likely to defeat their estate in it. It has sometimes been held, that equity will assist the donee in remainder, to whom a gift of personal property is made after the decease of another who is to have it only for life. And it may also be, that no disposition which the widow could make of the property, otherwise than such as resulted from its use and consumption, would be effectual as against the children to whom the unconsumed remainder is bequeathed, and, that a remedy is open to them, to charge the person receiving it under such unauthorized disposition, like that pursued in the case of *Huston v. Craighead*, 23 Ohio St. 198. But we are of opinion, no duty was imposed upon the executor, to exact an inventory from the widow when he delivered the personal estate to her according to the requirement of the will, or to institute proceedings to protect the donees in remainder ; nor, is he responsible for any disposition made of the property by the widow after it lawfully came to her possession, or thereafter accountable for it, in his representative capacity. It can not be claimed, that any express duty is enjoined by the will upon the executor, with respect to the estate in remainder. He is not required or directed to take charge of the unconsumed personalty, and divide it among the children. It is given by the will directly to them, to be equally divided among them. Upon this point the case is not distinguishable from *Flickinger v. Saum*, 40 Ohio St. 591. There, the testator devised and bequeathed his real and personal estate, after the payment of his debts, to his wife for life, remainder to be equally divided between the heirs of his children. The executor paid the debts, and delivered the balance of the personal estate to the widow. It was held the

Harpold *et al.* v. Stobart.

executor had no remaining duty to perform, and that it was not his duty to divide the estate in remainder. It is said in the opinion by Martin, J., that after the executor paid the debts; (there being no legacies to pay), "he had no right to retain the assets. The devise to the widow was of *all* the personal property, and was in its nature specific. The assent by the executor was a relinquishment of all claim to the property, and perfected the title of the widow and remainder men." And see *Ratcliff v. Warner*, 32 Ohio St. 334.

In the case now under consideration, the bequest to the wife is of all the testator's personal estate. The debts and funeral expenses were paid by the executor. There were no legacies to be paid. The executor had no right to withhold from the widow, the personal estate remaining in his hands, and nothing remained for him to do but deliver its possession to her, and settle his accounts. This, according to the agreed statement of facts contained in the bill of exceptions, the executor did, and we think the court of common pleas correctly held, that the estate was finally settled and distributed in conformity to the will. As this conclusion is decisive of the case, we leave undecided the questions argued, concerning the validity, and effect of the transfer by Mrs. South of her expectancy, and the rights of the defendants in error in the property. Those questions could not properly be determined in the proceeding prosecuted by them in the probate court, nor in any other which that court has jurisdiction to entertain.

*Judgment of the circuit court reversed, and that of the common pleas affirmed.*

## HARPOLD ET AL. v. STOBART.

*Stockholders—Statutory liability of—Transfer of stock—Must be made upon the stock book—When liability attaches.*

1. Where, in a suit brought by creditors of an insolvent corporation to enforce statutory liability against stockholders, a defendant pleads that, prior to the insolvency of the corporation, he sold in good faith his shares of stock to another party, who is solvent, and prays that whatever sum may be found to be due as respects the shares so sold may be

46s	397
46s	506
46	397
51	239
46	397
62	446
62	461
612	462
162	464

---

*Harpold et al. v. Stobart.*

---

- adjudged against such party, and issue is joined by reply, and a judgment is rendered in the court of common pleas, from which an appeal is taken by the vendor to the circuit court, such appeal carries up the case as to said vendee, whether he appeals, in his own right, or not.
2. Where, in such case, the vendor causes an entry of transfer to be made by the secretary of the company, in a book then present at the company's office other than the stock book, with the expectation that it will be entered in another book then at the residence of the secretary, but no transfer is made in the stock book of the company, and, at the time of the accruing of the debts of the corporation, and at the time of the trial, such vendor appears, by the stock book, to be the owner of the shares, such entry of transfer is not sufficient to relieve the vendor of liability to the creditors of the corporation, notwithstanding the fact that the sale was made in good faith and for value, and that the vendor believed he had done all that was necessary to effect a transfer of the stock, and the further fact that the company thereafter treated the purchaser as the owner of the stock so sold.
3. A stockholder who, in good faith, sells and transfers his stock to one who afterwards becomes insolvent, is liable to creditors of the corporation, for such portion only of the debts existing while he held the stock, and remaining due, (not in excess of the amount of stock assigned) as will be equal to the proportion which the capital stock assigned by him bears to the entire capital stock held by solvent stockholders within the jurisdiction, liable in respect of the same debts, to be ascertained at the time judgment is rendered.

(Decided April 23, 1889.)

### ERROR to the Circuit Court of Meigs County.

This proceeding in error is brought by Peter Harpold, W. A. Roberts, Daniel Bibbee, the executors of Moses E. Sayre, and John A. Williamson, to reverse judgments rendered against them in the Circuit Court of Meigs County.

The action below was brought by creditors of the Riverside Salt Company, a corporation organized under the laws of Ohio, which had become insolvent, and a large number of persons, including plaintiffs in error, as stockholders, for the purpose of enforcing the statutory liability against them in favor of the creditors. Several of the defendants were not stockholders when the corporation became insolvent, but had been such at dates anterior thereto, and were charged as liable because they had assigned to persons who were insolvent. W. A. Roberts was a creditor of the company, and, for a time, a

stockholder. He sold and transferred his stock, May 29, 1875, to R. R. Hudson. The case was tried in the common pleas and appealed to the circuit court, by the plaintiffs in error, save Roberts, who did not appeal. In that court, judgments were rendered against the plaintiffs in error, a reversal of which is sought by this proceeding. Upon the judgment rendered against Roberts in the common pleas, he paid the sum of four hundred dollars. Further facts necessary to an understanding of the points decided, appear in the opinion.

W. A. Roberts' special claim is that the judgment of the circuit court is erroneous, because the case, as to him, was not appealed to that court.

Peter Harpold's special claim is that he had sold and transferred his stock to plaintiff in error, Roberts, and that the circuit court erred in holding him as a stockholder.

The further claim of these parties, and the claim of the remaining plaintiffs in error is, that, as to each, the judgment rendered is excessive.

*Russell & Russell*, for plaintiffs in error.

*W. H. Lasley and J. U. Myers*, for defendant in error.

SPEAR, J.

1. Was W. A. Roberts a party in the circuit court?

Issue was made by the answer of Harpold, and the reply, as to his alleged transfer to Roberts, and as to his right to have all assessments against the shares of stock by him sold to Roberts, made against that party. Hence Roberts was a party necessary to the working out of the equities of Harpold, and that fact gave Harpold the right to appeal the whole case in so far as it affected him, and that appeal carried Roberts into the circuit court, whether his presence in the case as a creditor had a like effect or not. There was no error in overruling Roberts' motion to dismiss the appeal. But the appeal vacated the judgment rendered against Roberts in the common pleas, and his payment of four hundred dollars, made on that judgment, should have been credited to him in the circuit court, and the refusal to so credit it, we think was error.

---

*Harpold et al. v. Stobart.*

---

2. Did the circuit court err in its judgment against Peter Harpold ?

The controversy arises as to thirty shares of stock, which, on May 12th, 1873, he sold in good faith and for value, to W. A. Roberts, and he claims that, as to these, he should be held only as a guarantor for Roberts, and that such liability should be confined to a proportional liability for debts existing at the time of the sale. The sale was admitted, but it was claimed by the creditors that there was no transfer of the stock on the books of the company, and hence that Harpold continued liable to creditors as though he had owned the stock at the commencement of the action. The findings of the circuit court show that the transfer stock book of the company was Journal A; that no transfer of this stock was made on that book, though a transfer was, at the time of the sale, entered by the secretary in a small book present in the office of the company, and it was then understood that the secretary would make the transfer in another book then at his house. The president and directors of the company were present and knew of the transaction. Harpold was a director at the time, and he did all that he supposed necessary to effect the transfer, and the corporation thereafter treated Roberts as the owner of the stock. Two years later, there was an entry on Journal A, of the transfer of eighty shares from Roberts to one R. R. Hudson, which included the thirty shares purchased by Roberts from Harpold. At the time of the trial Harpold still appeared by Ledger A and Journal A, to be the owner of thirty shares of stock.

The creditors have the right to resort to and rely upon the proper book of the company as showing who the stockholders are, and the amount of stock held by each, and they are presumed to have relied upon the record so found in this case. While it is not necessary that a book of any special kind be adopted for that purpose, yet when one is selected and used, that becomes the stock book, and transfers, to be valid, must be made upon that. The object to be accomplished by the keeping of such a book requires reasonable certainty as to its identity. Where the book so selected and used by the com-



pany shows that the party is the owner of shares of stock, he is estopped, as between himself and creditors, to contradict the record, provided the entry was placed in the stock book originally by his consent. And where the name of an actual stockholder appears upon that book as owning a given number of shares, the entry is presumed to have been made with his consent; at least this is so where it was correct when made, and, as between him and creditors of the corporation, he is estopped to contradict the record, or deny ownership of the shares. Revised Statutes, sec. 3259; Lowell on Transfer of Stock, secs. 82, 107, 191, 203; Thompson's Liability of Stockholders, sec. 217; *Ex parte Brown*, 19 Bevan, 97; *Stanley v. Stanley*, 26 Me. 191.

The circuit court treated Harpold as the owner of these shares, as between him and creditors, and this, we think, was correct. But, as between Harpold and Roberts, the former was entitled to a judgment against the latter.

3. The finding as to Daniel Bibbee presents the facts upon which may be determined the further question in the case. He was the owner of twenty shares of stock, the par value of which was \$2,000. On the 31st day of May, 1875, he sold this stock, in good faith and for value, to one R. R. Hudson, and the same was on that day transferred to the latter on the books of the company. The company continued to do business until the year 1878, when it failed, many new debts having accrued in the meantime. Hudson became insolvent, and was so at the time the cause was tried. At that time the liabilities of the corporation reached \$43,791.05, a sum in excess of the face value of all the stock held by solvent stockholders, as well those who had assigned their stock as those who were holders at the commencement of the suit. During the life of the corporation frequent changes occurred in the ownership of portions of the stock, and debts against the corporation accrued at various times during that period.

In its decree the court divided the indebtedness into series, and made assessments upon stockholders to meet each class of debts, with a finding as to what stockholders were solvent, and

---

*Harpold et al. v. Stobart.*

---

the amount of stock held by each at the date fixed for each assessment, rendering judgments accordingly. Those who owned stock at the commencement of the action, and were solvent, were assessed the full amount of their statutory liability, and that liability was thus exhausted. By this finding it appears that between July 11, 1873, and January 1st, 1875, there existed debts still unpaid to the amount of \$4,152.50, upon which assessment was made against Bibbee of \$519.25. Between June 15, 1870, and July 11, 1873, there existed debts still unpaid to the amount of \$13,148.00, upon which he was assessed \$1,391.00, and prior to June 15, 1870, there existed debts to the amount of \$926.90, upon which he assessed \$80.00, the whole amounting to a sum practically equal to the amount of his stock. In making these assessments the court commenced with the class of stockholders who held stock at the date of the failure of the company, and assessed each solvent stockholder to the full amount of his liability in respect of all the debts then due from the corporation. The amount so procured not proving sufficient to pay the obligations, the court then, proceeding to the class last in order of assignment of stock, assessed the solvent assignors of the present insolvent stockholders, in the amount of their liability in respect of the debts contracted prior to the transfer of their stock to their insolvent assignees, and so proceeded until all liability on stock was exhausted.

The effect of this rule, as to each solvent assignor of stock to an insolvent assignee, was, to make him liable, not simply to a proportionate amount of the indebtedness which existed while he was a stockholder equal to the ratio which his proportion of the capital stock bore to the entire stock held by solvent stockholders, but to an amount equal to the full amount of his stock.

It is claimed for Bibbee that he should have been assessed but \$956.64, in all, and that the court erred in omitting to include in the class of stockholders who were liable with him those who were holders of stock when the suit was commenced, but who, by the decree, were left out because their liability had already been exhausted. This claim presents the question

to be determined, which is: Is this party to be assessed in a class which includes only those who were stockholders at the time he was such and are solvent, or should such class include also those who continued to be stockholders, and so became liable in respect of after accruing debts?

We first inquire what liability was created? What right of contribution, if any, attended it? Is the liability which may be enforced to be measured by the extent of liability as of the time it attached, or may it be enlarged by reason of a change in the condition of the corporation brought about by after accruing debts? And is the right of contribution to be impaired by reason of like causes?

We are not materially aided in making answer, either by text books, or by decisions of courts outside of our own.

The constitutional provision is: "Dues from corporations shall be secured, by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." And the statute is: "All stockholders \* \* \* shall be deemed and held liable, to an amount equal to their stock subscribed, in addition to said stock, for the purpose of securing the creditors of such company." It will be noted that neither provision gives a rule for determining who are stockholders, nor for ascertaining whether or not all may be treated as stockholders for some purposes, and not for others. But such questions are left for determination by the courts in giving construction to the statute, as cases may arise. In construing these provisions, the holdings in this state are to the effect that the individual liability of stockholders attaches in favor of creditors at the time the debt is contracted, or the liability incurred by the corporation, and that such liability is not discharged by the subsequent assignment or transfer of the stock, but the successive assignees impliedly undertake to indemnify or discharge the assignor from the liability which attached to him while he held the stock. This right against the stockholders is intended for the common and equal benefit of

all the creditors. As between the stockholders and the creditors, each stockholder is liable severally to all the creditors; but, as between stockholders, there is a proportional liability by all stockholders and right of contribution which grows out of the organic relation existing between them, and, as between them, each stockholder is bound to pay in proportion to his stock. The liability is not a primary fund or resource for the payment of the debts of the company, but is collateral to the principal obligation which rests on the corporation, and is to be resorted to only in case of the insolvency of the corporation, or where payment cannot be enforced by ordinary process. *Wright v. McCormack*, 17 Ohio St. 86; *Umstead v. Buskirk*, *Id.* 113; *Brown v. Hitchcock*, 36 Ohio St. 667; *Wheeler v. Faurot*, 37 Ohio St. 26; *Bullock v. Kilyour*, 39 Ohio St. 543; *Mason v. Alexander*, 44 Ohio St. 318.

Of the foregoing there should be emphasized three important conclusions bearing upon the question under consideration, viz :

(1). The liability of the stockholder is collateral to that of the principal debtor, the corporation. (2). This liability attaches at the time the debt against the corporation is created or liability incurred. And (3), each stockholder sought to be so made liable, has, in order that his liability may be confined to his just proportion, the right to insist that all stockholders within the jurisdiction and solvent, who stand in the same relation to the debts with himself, shall be brought in, and be held to their proportional liability in common with him.

When it has been determined that the liability of the stockholder is collateral, and not original, his right to ask for a marshalling of other like securities arises. So, too, when it has been determined that the liability as to debts arises at the time they are incurred, it clearly follows that such liability is confined to debts which exist during the time the stock is owned. It follows, with equal certainty, that no mode of assessment should be adopted which enlarges the liability of the stockholder in the case we are considering, so as to make him liable, directly or indirectly, for debts contracted by the corporation after he has ceased to be a stockholder. And

when it has been ascertained that he has the right of contribution as between himself and his fellow stockholders who stand in the same relation with himself to the debts he is sought to be held for, it follows, with like certainty, that no rule of assessment which curtails that right is equitable or just. This liability has already attached, and it is in respect of debts existing at the time he assigns, and for nothing else. His right of contribution against his fellow stockholders, to require them to respond to their proportional share of the same burden, is enforceable in the same action, and this right is not inferior to that of the creditor to enforce his claim. They go together. It is equally plain, that if any of the stockholders who are alike liable with him, are assessed so that their liability is exhausted in the payment, in whole or in part, of debts, created after he has assigned his stock, then he is indirectly made to respond to debts of that character, and his right to insist upon proportionate contribution is, in like manner, impaired. As we have already found, he is, in a sense, a surety for the corporation. That is, his liability is secondary, and not primary. Resort must first be had to the corporation before he can be held. In Michigan, under a statute not dissimilar to ours as construed in *Wright v. McCormack*, *supra*, the Supreme Court (*Hanson v. Donkersley*, 37 Mich. 184), held a stockholder to be a surety, and that his liability is discharged by the extension of time by the creditor, and there are other authorities to the same effect. Whether or not the law, in Ohio, goes to that length, we need not inquire. It is enough to know that his obligation is collateral and secondary, and that he has the right to call upon his co-stockholders to bear their proportion of the common liability. Is it equitable to impair that right? True, the liability created by statute is for the benefit of creditors, but it does not follow that the creditor's interest is the only one the court should guard. All laws for the collection of debts are in the interest of creditors, but the duty of giving to the creditor the full benefit of such statutes does not warrant forgetfulness of the rights of the debtor. And in this case no reason exists for enforcing the right of the creditor

---

*Harpold et al. v. Stobart.*

---

given by the statute, and at the same time, ignoring the limitation placed upon that right by the construction of this court given to the statute.

After the stockholder ceases to be such, he has no voice in the management of the corporation, and no share in the profits that may thereafter be made. The creditor continues, or may continue, to deal with the corporation, and, in doing so, may delay indefinitely the collection of his debt, even if he may not, by a new contract, extend its payment, without consent or knowledge on the part of the stockholder who has assigned, and thus continue a contingent liability against the latter which he is powerless to terminate. Under such circumstances, it does not seem inequitable to place upon the creditor, rather than upon the former stockholder, the risks incident to such delays as affected by the incurring of new debts.

We are of opinion that a stockholder who has, in good faith, sold and assigned his stock to one who becomes insolvent, is liable to creditors of the corporation, for such portion only of the debts existing while he held the stock, and remaining due, (not in excess of the amount of stock assigned) as will be equal to the proportion which the capital stock assigned by him bears to the entire capital stock held by solvent stockholders, liable in respect of the same debts, who are within the jurisdiction, to be ascertained at the time judgment is rendered.

In this view, the mode of assessment adopted by the circuit court was not an equitable one, and the judgments against the plaintiffs in error Roberts, Williamson, Ex'r of Moses E. Sayre, and Daniel Bibbee, should be modified in conformity with the conclusions herein stated.

The costs in this court may be taxed one-half to plaintiffs in error, and one-half to defendants in error.

**BRADBURY, J.,** did not sit in the case.

## MANDEL v. MCCLAVE ET AL.

*Dower—Contingent right of—Mortgages—Foreclosure.*

1. The contingent right of a wife, during her husband's life, to be endowed of his real estate at his death, is property having a substantial value that may be ascertained with reasonable certainty from established tables of mortality, aided by evidence respecting the state of health and constitutional vigor of the husband and wife respectively.
2. Where the wife has joined in a mortgage of the husband's lands to secure his debt, upon a judicial sale of the premises, she may have the value of her contingent right of dower in the entire proceeds ascertained and the husband's entire interest therein shall be exhausted to pay the debt before resorting to the interest of the wife therein.
3. The release, in such mortgage, of her contingent right of dower does not inure to the benefit of the husband's subsequent judgment creditors, and, as against them, the ascertained value of her contingent right of dower in the entire proceeds of the sale will be paid to her out of the balance left when the mortgage debt is paid, before any part thereof will be distributed to them on their judgment.

(Decided April 23, 1889.)

**ERROR to the Circuit Court of Jefferson County.**

On the trial of this cause in the Court of Common Pleas of Jefferson County, the court stated its conclusions of fact and law separately; and the plaintiff in error, excepting, in one particular, to the conclusions of law drawn by the court, carried the cause to the circuit court on error, and that court affirming the judgment of the common pleas, she thereupon instituted this proceeding to reverse both judgments.

From the pleadings, aided by the facts found by the court of common pleas, it appears: that the plaintiff in error, Mrs. Mandel, joined with her husband in two separate mortgages made by him on his real estate to secure his debts; that afterwards the husband became indebted to the defendants, John McClave and William H. Lowe, separately, each of whom reduced his debt to judgment; that thereupon McClave brought suit to enforce his judgment, making parties thereto, the other judgment creditor, Lowe, the two mortgagees, and the husband and his wife, the plaintiff in error; that a decree was

46	407
52	624
46	407
55	552
46	407
68	584

taken in the action giving to each lienholder a judgment for the sale of the premises; that the sale was made on an order of sale caused to be issued by the judgment creditor, McClave; that after paying costs, taxes and the mortgage debts, there remained of the proceeds of the sale about \$3,900.00 for distribution; that the value of the wife's contingent right of dower was \$1,203.06, if she was entitled to be endowed of the whole estate, but only \$278.95 if she was only endowable of the equity of redemption; that the claim of the judgment creditor, Lowe, was \$1,774.70, and that of McClave \$1,730.39. The court then held, as matter of law, that the wife was only entitled to be endowed of the equity of redemption, and ordered \$278.95 to be distributed to her.

The other facts necessary to a decision of the case will be found in the opinion.

*John M. Cook*, for plaintiff in error.

Our claim is, that the property having sold for sufficient to pay the costs, taxes and the mortgage liens of the Union Deposit Bank and Joshua Manley, and at the same time allow plaintiff in error inchoate right of dower in the entire premises, that in joining with her husband in the execution of the mortgages for his debts, she only released her right of dower to the mortgagees, and that McClave or Lowe has no right to claim or obtain any advantage by her joining with her husband in those mortgages. *Kling v. Ballentine*, 40 Ohio St. 391; *Black v. Kuhlman*, 30 Ohio St. 196; *Kitzmiller et al. v. Van Renselaer*, 10 Ohio St. 63; *Unger v. Leiter*, 32 Ohio St. 210; *McArthur v. Franklin*, 16 Ohio St. 205-206; *Ketchum v. Shaw*, 28 Ohio St. 508; *Baker v. Fetters et al.*, 16 Ohio St. 596; Jones on Mortgages, secs. 46 and 666.

It may be claimed that the doctrine laid down in *State Bank v. Hinton*, 21 Ohio St. 509, is in conflict with this claim, and so it seems to be. The circumstances of that case, however, differ materially from the facts of this case. *Bank v. Hinton* cannot be harmonized with *Black v. Kuhlman*, if the rule laid down in the former case is of the general application claimed for it. The law of Ohio is becoming more liberal as to the



rights of married women, and the claim of plaintiff in error does equal justice to all parties.

*McClave & Lewis*, for defendants in error, filed no brief.

BRADBURY, J. The husband of plaintiff in error is still living, and, therefore, when his lands were sold by the sheriff and the proceeds thereof distributed by the order of the court of common pleas, she had only a contingent right of dower therein. This right, the court found, was sold and passed to the purchaser at the sheriff's sale. To this finding she took no exception, being apparently satisfied to have her rights determined by the order of distribution.

The proceeds of the sale were \$17,600, of which \$13,663.37 were consumed in paying the taxes, costs and mortgage liens, about which no contention arose; there then remained a balance of \$3,930.63 to be distributed to the wife and the two judgment creditors. Of this sum she claimed \$500.00, in lieu of a homestead; on this claim the court found in her favor, and the amount was paid to her. The defendant, McClave, excepted to this finding and order of the court, but did not, so far as the record discloses, bring the question to the attention of the circuit court, nor has he presented the matter to this court for review. He will, therefore, be regarded as acquiescing in the action of the court below respecting it, and the question will not be further noticed here.

The only ruling of the courts below that we are asked to review, is that which limited the right of the wife to dower in the proceeds of the equity of redemption. As the fund is large enough to pay in full Lowe's claim, notwithstanding the wife's claim may be allowed to its full extent, it follows that he is not interested in the question; but as the claim of the wife, to the extent it may be allowed, will be paid out of funds that would, otherwise, be distributed to McClave, the contention is confined to them.

McClave concedes that the wife is entitled to be endowed of the proceeds of the equity of redemption, while she claims the right to be endowed of the entire proceeds of the land, to be paid, however, out of the proceeds of the equity of redemption.

He contends that her release of dower to the mortgagees inures to his benefit ; that it was an absolute release of that right in the premises to the extent of the mortgage debt, and that in satisfying the mortgage debts out of the proceeds, her interest in so much of the fund as was required for that purpose, should be applied equally with that of her husband.

Her contention, upon the other hand, is, that her contingent interest in the *whole* premises was *pledged*, together with the *whole* interest of the husband therein for the payment of his debt; that the debt being his, it was primarily chargeable upon his interest, and that his entire interest in the thing pledged should be applied to pay the debt before resorting to her interest therein.

This precise question is new in this state, and we are to solve it by applying to the facts, such settled legal and equitable principles as in their nature are applicable and pertinent thereto.

If the contingent right of a wife to dower in her husband's real estate is recognized by the laws of the state as property, and if her release of it by joining with her husband in a mortgage to secure his debt, is not a technical bar, but, instead, only inures to the benefit of the mortgagee and his privies, we perceive no principle of law or public policy that should prevent a court of equity from applying, in favor of the wife, the equitable rule, that the property of the debtor shall be first applied to the satisfaction of his debt before resorting to that of the surety. And the creditors of the husband have no standing in a court of equity, to prevent the application of this equitable rule ; they have no claim that property, which as between husband and wife belongs to the wife, shall be taken, without her consent, and applied to pay their debts against the husband. The first question, therefore, to be determined, is whether, in this state, the contingent right of a wife to dower in her husband's real estate, is property, having a substantial and ascertainable value.

To reconcile all the cases, even in Ohio, on the subject of the nature of the wife's contingent right of dower, or respecting the effect of her release of it by joining with her husband

in a conveyance of the real estate to which it attaches, would be impossible. In the cases upon the subject in this, or in other states, or in England, almost every shade of opinion can be found. Nowhere is this wide divergence of judicial opinion more clearly set forth than in the dissenting opinion of Judge Johnson, in *Black v. Kuhlman*, 30 Ohio St. 196, where that able judge reviews the cases in support of the older and more technical rules on the subject. The court, however, took the more liberal, and, as we think, the more reasonable view of the question. And there seems to be clearly discernible in the Ohio cases, a growing tendency to disregard the older and more technical rules of the earlier cases; and this is especially true of the later cases in this state.

It is an incontestable fact that, in the estimation of the business world, the contingent right of the wife, during the husband's life, to dower in his real estate, at his death, has a positive and substantial value, and no acuteness of artificial reasoning, founded on technical rules of law, can persuade a prospective purchaser to the contrary.

This practical view of the matter has been adopted by the later Ohio cases. *Ketchum v. Shaw*, 28 Ohio St. 503; *Black v. Kuhlman*, 30 Ohio St. 196; *Unger v. Leiter*, 32 Ohio St. 210; *Kling v. Ballentine*, 40 Ohio St. 391.

In *Black v. Kuhlman*, *supra*, the court held, not only that her contingent right of dower was valuable, but that, during her husband's life, its value could be ascertained with reasonable certainty under tables of mortality, "based on wide and long observations." And furthermore, that its value should be thus ascertained, as against mortgagees in whose mortgages she had not joined, and paid to a subsequent mortgagee to whom, by joining with her husband, she had subsequently released it.

In *Unger v. Leiter*, *supra*, the court found the contingent right of the wife to dower to be valuable, and that value capable of ascertainment "by reference to tables of recognized authority on that subject, in connection with the state of health and constitutional vigor of the wife and her husband." In addition to these cases we have statutory recognition of the pro-

perty of the wife in her contingent right of dower in the real estate of her husband during his life. Ohio Laws, vol. 82, page 14. This statute directs the probate court to ascertain the value of the wife's contingent dower in the real estate of an insolvent debtor, and directs the same to be paid to her. Thus, we have the legislature as well as the courts of the state, recognizing this right as tangible property, capable of being ascertained, and in a proper case given to her or to her releasee.

What, then, is the effect of her release of this right by joining with her husband in a mortgage to secure his debt? Does it inure to the benefit of other persons who are strangers to the deed, or is its operation restricted to the grantee and his privies? This latter view we think the more reasonable; it accords more nearly with the probable intention of the parties to the instrument; there is no ground to assert that the mortgagee was contracting for the benefit of any one but himself; there is nothing in the nature of the transaction from which it can be inferred that a wife, by joining with her husband in a mortgage of his lands to secure his debt, intends more than to pledge her contingent right of dower for that particular debt; nor is there, in the terms of the instrument itself, any language importing such intent. If, therefore, the instrument has any such effect, it is the result of some technical rule of law giving to the deed of the parties in this respect an operation never, so far as can be gathered from the words of the parties, within their contemplation. Whatever the state of the law may be elsewhere, we think no such technical rule now prevails in Ohio; some of the earlier cases seem to give it support, but the tendency of the later cases is to limit the operation of the release to the mortgagee and his privies.

In *Ketchum v. Shaw*, 28 Ohio St. 503, a case involving the right of a wife to dower, we find this language used by Judge Wright (506): "She joined in the conveyance of the land, releasing her dower, not absolutely, but only so far forth as it was necessary to pay the mortgage debt. That done, everything else remains to her."

In *Kitzmiller v. Van Renselaer*, 10 Ohio St. 63, it appeared, that after the recovery of a judgment against the husband, he sold his real estate to a third person, the wife joining in the deed by a release of dower. Afterwards the land was sold under an execution issued on the judgment, whereupon the purchaser ejected the grantee under the deed of the husband and wife. The husband then died, and the wife brought suit for dower against the purchaser at the judicial sale. He sought to defeat her claim for dower by setting up her release to the grantee of the husband; but the court held that the release did not inure to his benefit. On page 64, this language is found: "He can not make the release available to him as a grant, for he was not a party to the grant; nor is he in privity with the grantees. The release can not operate in behalf of the defendant below, by way of estoppel; for, "a stranger can not be bound by, nor take advantage of, an estoppel." Here the wife had released her right of dower to the grantee of her husband, absolutely; no right of redemption reserved as in a mortgage, yet the court hold that the release is wholly inoperative except in favor of the grantee. Cases can be found in Ohio, that conflict with this view; but this irreconcilable conflict leaves us to adopt that view which accords most nearly with that presumed intention of the parties, which arises from the nature of the transaction, and a rational construction of the language they have used.

It being established that the contingent right of the wife to dower in her husband's real estate is property, the value of which can be ascertained by the aid of fixed principles, and that her release of it by joining with her husband in a mortgage, to secure his debt, does not, by reason of any technical rule of law, inure to the benefit of a stranger to the instrument, either by way of grant or estoppel, it remains for the court to determine to what extent equity will protect this right, after the real estate has been converted into money and the fund is before the court for distribution. The undoubted rule is, that, so long as the real estate remains in the husband or his grantee, equity will not interfere in her favor during the life of the husband, but that she must await her husband's

death, when her inchoate right will become consummate. When, however, the estate has been sold at a judicial sale, free from her contingent right of dower, whatever right she may have, is in the proceeds of the sale, and must be enforced, if at all, by a distribution of the fund.

If the plaintiff in error had been seized of a separate estate, and it had been pledged, together with the husband's property, for the payment of his debt, there can be no doubt that his property would be primarily liable for its payment. As between each other he would be the principal and she his surety. We think the same principle should be applied to her contingent right of dower. It is property; its value can be ascertained. More than this, it is a favorite of the law. (See authorities collected in *American & English Encyclopedia of Law*, Vol. 5, page 885, note.) It is a provision for her support, and when she pledges it for her husband's debt, by joining in a mortgage with him, the most obvious principles of natural justice require that this benevolent provision of the law should not be touched until the husband's interest has been first exhausted. She is a purchaser. The inception of her right was earlier than that of the creditors; it began with the marriage and seizin of the husband; theirs began when the debt was contracted, but only became a lien from the recovery of the judgment against the husband. This favorite of the law is entitled to protection equal to that accorded to her other property.

We are aware that this question has been decided differently in many of the states, but by courts holding views of the nature of contingent dower, and of the effect of the wife's release thereof, widely different from those adopted in this state in relation thereto, and the decisions are, therefore, of little or no weight here. One Ohio case, *Bank v. Hinton et al.*, 12 Ohio St. 509, is not in harmony with our view, but the able judge who wrote the opinion in that case, rested the decision respecting this point upon the authority of two New York cases: *Hawley v. Bradford*, 9 Paige, 200, and *Bell v. New York*, 10 Paige 49, and entered upon no discussion of the principles necessarily involved therein.

The conclusions reached by the court in these two cases in Paige, were legitimately drawn from the doctrine which obtains in New York respecting the nature of the contingent right of the wife to dower, and the effect of a release of it by her, by joining with her husband in deed or mortgage; but they by no means follow from the rules laid down in Ohio cases on the same subject, and therefore those cases cannot be regarded as of sufficient authority to prevent our deducing from the Ohio cases such results as legitimately follow from them.

Whether *Bank v. Hinton*, *supra*, resting as it does upon those cases in Paige, has become a rule of property in this state; which we would deem ourselves bound to follow in cases coming within its exact terms, we need not stop now to enquire.

The more recent case of *Kling v. Ballentine*, *supra*, is in accord with our decision here. In that case the contest was between the widow and certain devisees, who were daughters of the husband. The widow had, during her husband's life, joined with him in a mortgage of his land to secure his debt, and the court held that, as against the husband's devisees, who were his daughters, the widow was entitled to dower in the whole of the lands, to be paid out of the surplus after the mortgage debt had been paid, thus exhausting the husband's interest before resorting to the wife's dower. In that case the devisees were entitled to all the interest of the husband, their devisor, as in the case at bar the judgment creditors were entitled to all the interest of their debtor in the fund; and the principles that underlie and justify the holding of the court in that case, are the same which we apply to the case before us; they are, that the contingent interest of the wife to dower in her husband's real estate is valuable, and that her release of it by joining with him in a mortgage to secure his debt, is not a technical bar, and inures only to the mortgagee and those claiming under him.

*It follows, therefore, that the judgment of the circuit court and that of the court of common pleas should be modified so as to give the plaintiff in error the value of her contingent right of dower in the entire fund.*

## WILLIAMS v. LOCKOMAN ET AL.

*County ditch—Evidence on appeal.*

On an appeal to the probate court from the order and finding of a joint board of county commissioners, determining that a proposed ditch is necessary, and will be conducive to the public health, convenience and welfare, the jury, in examining and determining the matter appealed from, may, under section 4467 of the Revised Statutes, consider in evidence, facts made known to them personally from an actual view of the premises.

(Decided April 23, 1889.)

ERROR to the Circuit Court of Henry County.

*Stephenson & Knupp, W. W. Tourelle and H. H. Ham*, for plaintiff in error.

*R. W. Cahill, Haag & Ragan*, for defendants in error.

BY THE COURT. Frederick W. Lockoman, William Lockoman and Philip Yarnell, defendants in error, filed their petition in the office of the auditors of Henry and Fulton counties, addressed to the joint board of county commissioners of those counties, praying for the location and construction of a joint county ditch on a route and terminus described, and representing that they were the owners of lands and lots which would be affected by the improvement asked for; that the improvement was necessary to drain and reclaim the lots or lands along the line thereof and adjacent thereto, and that such improvement would be conducive to the public health, convenience and welfare.

On appeal to the probate court by John H. Williams, the plaintiff in error, from the order and finding of the joint board of commissioners determining that the proposed ditch was necessary, and would be conducive to the public health, convenience and welfare, the probate court charged the jury as follows:

"You were ordered to view the premises along the whole route. This was for the purpose of enabling you better to



determine the questions in this case, and to apply your own judgment in regard to them, as well as to better understand the evidence given, and in making up your verdict you will consider both the facts appearing to you from the view of the premises and the evidence adduced."

The court of common pleas reversed the judgment of the probate court. The circuit court reversed the judgment of the common pleas, and affirmed the proceedings and judgment of the probate court, and found as the law of the case, that the jury in the probate court upon the trial of the issues of the case therein, might and should take its view of the premises as evidence, in determining the question as to whether the proposed ditch would be conducive to the public health, convenience or welfare.

The county commissioners are required by section 4452 of the Revised Statutes, to take to their assistance a competent surveyor or engineer, if, in their opinion, his services are necessary, and at once proceed to view the line of the proposed improvement, and determine by actual view of the premises along and adjacent thereto, whether the improvement is necessary, or will be conducive to the public health, convenience or welfare.

By section 4463 of the Revised Statutes, an appeal may be taken from a final order or judgment of the commissioners, determining whether the ditch will be conducive to the public health, convenience or welfare.

And on appeal to the probate court, it is provided by section 4467 of the Revised Statutes that "The probate judge shall administer to the jurors an oath, faithfully, impartially, and to the best of their ability, and from actual view of the premises along the whole route of the improvement, to examine and determine the particular matters appealed from, and to render a true verdict according to the facts appearing to them from actual view of the premises, and the evidence, under the charge of the court."

The provisions of section 4467 manifestly contemplate, that by an actual view of the premises, the jury shall be enabled not

---

*Sheifers et al. v. Insurance Company.*

---

only the better to apply the testimony disclosed at the trial, but shall also be aided by their personal knowledge of the facts as derived from an actual view of the premises, in examining and determining the particular matters appealed from, which, in the present case, embrace the order and finding of the joint board of commissioners, that the proposed ditch was necessary, and conducive to the public health, convenience and welfare.

*Judgment affirmed.*

---

SCHEIFERS ET AL. v. INSURANCE COMPANY.

*Life insurance — Lapse of premiums — Massachusetts' Statute—"Net single premium of temporary insurance."*

Where in a suit upon a policy of life insurance the plaintiff relies upon the provisions of a statute of the state of the company that issued it, to avoid the effect of a forfeiture for non-payment of premiums, the facts bringing the case within such provision must be averred.

(Decided May 14, 1889.)

ERROR to the Superior Court of Cincinnati.

The suit below was upon a policy of life insurance ; and the errors assigned arise upon the sustaining of a demurrer to the amended petition of the plaintiffs. The pleading as amended reads as follows :

"And now come the said plaintiffs, and by leave of the court first had and obtained, file this their amended petition ; and for a cause of action against the said defendant, say : That the plaintiff, Elizabeth M. Scheifers, is the widow, and the other above named plaintiffs are the children and heirs at law, of Rudolph F. Scheifers, deceased, and Elizabeth M. Scheifers ; that said plaintiffs, Rudolph F. Scheifers and Clara Scheifers, are minors, aged respectively fourteen and seven years, and bring this action by their next friend, said William R. Scheifers.

"That the defendant, the said Massachusetts Mutual Life Insurance Company of Springfield, Massachusetts, is a duly

incorporated life insurance company, under and by the laws of the State of Massachusetts, and is located in said state, at Springfield, Massachusetts.

“That on the second day of September, 1863, at the city of Cincinnati, in this the State of Ohio, then and there, by and through its agent, located at said Cincinnati, receiving the premium from the insured, and delivering to him the policy hereinafter mentioned, in consideration of the payment of forty dollars and sixty-seven cents, annually, during the life of the said Rudolph F. Scheifers, deceased, the said defendant, then and there, did duly execute its policy of insurance in writing to said Rudolph F. Scheifers, since deceased, on his life, in the sum of two thousand dollars, said sum so insured being expressed in said policy for the express benefit of the said Elizabeth M. Scheifers, wife of the said insured, and their children, who are these plaintiffs, a copy of which policy is annexed to and filed with the petition herein; that at the time of effecting said insurance, and at no time thereafter, had the said insured any notice or knowledge (and he was a resident of the State of Ohio) of the statute of the State of Massachusetts hereinafter mentioned; nor had any of the plaintiffs such knowledge, but were wholly ignorant of the same, until the time and in the manner hereinafter stated, while they aver that the defendant, before, at the time of, and ever since making said contract of insurance, had full knowledge of said statute, and of all its terms and provisions, and had then obtained the privilege to do business in this state as a foreign life insurance company; that the premiums under said policy were duly paid to the defendant by said insured for the period of thirteen years to September 2, 1876; that on said last named day there was an additional premium due, which additional premium was unpaid by said said assured, and no premium was thereafter paid by him, or any one for him, before his decease, which occurred on July 13, 1881, but all the other terms and conditions of said policy were duly kept and performed by said assured until his death, as aforesaid.

“That the defendant, knowing, as aforesaid, said statute, and said insured being wholly ignorant of the same, incorporated

---

Sheifers *et al.* v. Insurance Company.

---

the following terms and provisions in said policy, to which the said assured, in ignorance of such statute, assented, to-wit :

*“ Massachusetts Mutual Life Insurance Company, Springfield, Mass., Incorporated by the Legislature of Massachusetts, 1851.”*

“ This policy witnesseth, that the Massachusetts Mutual Life Insurance Company, in consideration of the premium of forty dollars and sixty cents, to them paid as per margin by Rudolph F. Scheifers, of Cincinnati, in the county of Hamilton, and in the State of Ohio, being the assured in this policy, and a like sum to be paid to them by the said assured, on or before the second day of September in every year during the continuance of this policy, do insure the life of Rudolph F. Scheifers in the amount of two thousand dollars, for the term of the continuance of life, from the date hereof at noon. And the said company do hereby promise and agree to and with the said assured, his executors, administrators, or assigns, well and truly to pay the said sum insured to the said assured, his executors, administrators, or assigns, ninety days after due notice and proof of the death of the said Rudolph F. Scheifers *during the continuance and before the termination* of this policy, the balance of the year's premium, if any, being first deducted therefrom ; said sum insured being for the express benefit of Elizabeth M. Scheifers, wife of the said assured, and their children.

“ Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured, upon these express conditions :

“ 4. \* \* \* And in case the premiums shall not be paid to said company on or before the time herein mentioned for the payment of the same, then, and in every such case, the said company shall not be liable for the payment of the sum insured or any part thereof, and this policy shall cease and determine.”

And said policy contained the further condition, in relation to any credit or notes given by the assured to said defendant for any premium, etc., that “ on non-payment of any premium,

or such note or security, or any part thereof, when due, this policy shall be forfeited to said company, and become void."

"6. In case of this policy becoming null and void, the holder of the same will not be entitled to a return of any part of the premium paid thereon."

That the plaintiffs claim the defendant thereby represented to said assured that it had the corporate power and authority to make the contract of insurance aforesaid, which the assured understood and believed.

That these plaintiffs being wholly ignorant of the statute of Massachusetts hereinafter mentioned, and never having been residents of the State of Massachusetts, but of the State of Ohio, believed from the said statements made by said defendant in said policy, that it had, with all the premiums paid upon the same, become void and forfeited to the defendant on and from the said second day of September, 1876; that none of them were administrator or executor of said assured, or had the custody of said policy and papers relating to said insurance, until long after the expiration of ninety days from the death of said assured; that had they known of said above mentioned statute of Massachusetts, they would, within ninety days after the decease of said assured, have given the defendant notice of the claim, and submitted to it proof of the death of said assured, in all respects as required by said statute; that as soon as they learned of the existence of said statute they notified the defendant of the death of said Rudolph F. Scheifers, and requested the defendant to furnish them with the necessary forms or papers, that they might make proof of loss of said death, and demand of payment, within ninety days after such said discovery of said statute of Massachusetts (which proof in due form they were ready and willing to make, and furnish said defendant, and offered so to do), but the defendant refused to furnish them with such forms and papers, as it was bound to do, or make payment for said loss, but denied its liability to the plaintiffs upon said policy for any sum whatever; that said statute of Massachusetts is in the words and figures following, to-wit:

## ‘CHAPTER 186.

*‘An Act to Regulate the Forfeiture of Policies of Life Insurance,  
Approved April 10, 1861.*

‘Be it enacted, etc., as follows :

‘SECTION 1. No policy of insurance on life, hereafter issued by any company chartered by the authority of this Commonwealth, shall be forfeited or become void by the non-payment of premium thereon, any further than regards the right of the party insured therein to have it continued in force beyond a certain period, to be determined as follows, to-wit :

‘The net value of the policy, when the premium becomes due and is not paid, shall be ascertained, according to the “combined experience,” or “actuaries” rate of mortality, with interest at four per centum per annum. After deducting from such net value any indebtedness to the company, or notes held by the company against the insured—which notes, if given for premium, shall then be cancelled—four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of the premium, and the assumptions of mortality and interest aforesaid.’

‘SECTION 2. If the death of the party occur within the term of temporary insurance covered by the value of the policy, as determined in the previous section, and if no condition of the insurance other than the non-payment of the premium shall have been violated by the insured, the company shall be bound to pay the amount of the policy the same as if there had been no lapse or premium, anything in the policy to the contrary notwithstanding: Provided however, that notice of the claim and proof of death shall be submitted to the company within ninety days after the decease; and provided, also, that the company shall have the right to deduct from the amount insured in the policy the amount of six per cent. per annum of the premiums that have been forborne at the time of death.’

“And that said defendant never at any time insisted upon, or made any claim under, said *first* section of said statute, or

notified the said assured thereof in any way, and of which he was wholly ignorant, as were these plaintiffs, none of whom were ever so notified by the defendant.

“Wherefore the plaintiffs ask judgment against the defendant for the sum of two thousand dollars, with interest from July 13th, 1881.”

Judgment having been rendered in favor of the defendant on the demurrer at special term, was afterwards affirmed on error in general term; and this proceeding is prosecuted to reverse the judgments of both terms.

*Alfred Yaple and A. S. Langley*, for plaintiffs in error.

*Thompson, King, Richards & Thompson*, for defendant in error.

BY THE COURT. The effect of the Massachusetts's statute was to save the policy from a forfeiture by a lapse of the premiums from September 2, 1876, to the death of the life insured, provided the death occurred “within the term of temporary insurance covered by the value of the policy” as provided in the first section. The provision is as follows:

“The net value of the policy, when the premium becomes due and is not paid, shall be ascertained, according to the ‘combined experience,’ or ‘actuaries’ rate of mortality, with interest at four per centum per annum. After deducting from such net value any indebtedness to the company, or notes held by the company against the insured—which notes, if given for premium, shall then be cancelled—four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of the premium, and the assumptions of mortality and interest aforesaid.”

The petition does not show that the death of the party occurred within the term of temporary insurance to which he would have been entitled under the provisions of this statute at the time the lapse in the payment of the premiums occurred. No data are given from which the “net single premium of

---

Miller, Treas. v. The First National Bank *et al.*

---

temporary insurance" to which he would have been entitled, can be ascertained. The age of the party at the lapse of the premiums is not given, nor is it shown whether he was indebted to the company in any way, nor, is given the "combined experience" or "actuaries" rate of mortality applicable to the case. Hence the petition failed to state a cause of action.

*Judgment affirmed.*

46 424  
59 256

---

MILLER, TREAS. v. THE FIRST NATIONAL BANK.

MILLER, TREAS. v. THE MERCHANTS' NAT'L BANK.

MILLER, TREAS. v. THE THIRD NATIONAL BANK.

*National bank stock—How listed for taxation—Sections 2765 and 2769, Rev. Stats. construed.*

1. There is no authority in the statutes of the state, nor of the United States, for listing and valuing the shares in a national bank in the aggregate, and placing such aggregate on the tax-list in the name of the bank. Such shares, when listed and valued for taxation, are required to be placed on the proper tax-list in the names of the respective owners.
2. The listing of the shares for taxation is provided for and secured by § 2765, R. S.; and the correction of returns made by the cashier of the bank to the county auditor, is provided for by § 2769 and not by § 2782, R. S.

(Decided May 21, 1889.)

**ERROR** to the District Court of Hamilton County.

The action below was by the Treasurer of Hamilton County against the First National Bank of Cincinnati. The questions arise upon a demurrer to the petition on the grounds, (1), that there is a want of proper parties, and (2), that the petition does not state facts sufficient to constitute a cause of action. The petition is as follows:

"Plaintiff says that he is the duly elected and qualified Treasurer of Hamilton County, Ohio, now holding and exercising said office, and that the defendant is a National Bank, incorporated under the laws of the United States, having now and during all the time hereinafter referred to, its place of,



and transacting its business in Cincinnati, Hamilton County, Ohio.

"Plaintiff says that in each of the years 1877, 1878, 1879, 1880 and 1881, the said defendant, by its cashier, for the purposes of taxation, made a return to the Auditor of Hamilton County, Ohio, purporting to be a true return of the resources and liabilities of said bank at the close of business on the Wednesday next preceding the second Monday of May of each of said years, but did not return any statement of the names and residences of the stockholders therein, with the number of shares held by each, but, instead thereof, a written statement that said bank would pay the taxes for and on behalf of the stockholders; and said bank did pay the taxes levied in accordance with said returns so made out; but plaintiff says that the Auditor of said County of Hamilton in the year 1881, discovered that said returns were false. Thereupon said auditor proceeded to correct said returns, and having fully inquired, in accordance with the requirements of the statute in such cases made and provided, into the amount of the personal property, money, credits and investments that said bank should have returned for each of said years, and having first notified the cashier of said bank and permitted full opportunity for the same to be heard by its counsel and officers to show that its said returns were correct, he, the said auditor thereupon found that each of said returns were false, and that there had been omitted from the same, personal property which should have been included therein and listed for taxation of the value, for the year 1877 of \$82,837; for the year 1878 of \$475,522; for the year 1879 of \$349,246; for the year 1880 of \$481,159, and for the year 1881 of \$377,827, which said sums the said auditor, on April 8, 1882, placed on the tax list against the defendant, as, and for the years 1877, 1878, 1879, 1880 and 1881, respectively, when the same should have been returned, and opposite to the same the taxes on said sums for the said years, amounting for the year 1877 to to the sum of \$2,410.56; for the year 1878 to the sum of \$13,571.40; for the year 1879 to the sum of \$10,121.14; for the year 1880 to the sum of \$14,915.50, and for the year 1881 to

the sum of \$8,837.76, which taxes now stand charged on the duplicate of said Hamilton county; that the same are due and unpaid, and the stockholders of said bank are indebted to the plaintiff, as treasurer of said county, in the said sum of \$2,410.56, with interest thereon from December 20, 1877, and in the sum of \$13,571.40, with interest thereon from December 20, 1878, and in the sum of \$10,121.14, with interest thereon from December 20, 1879, and in the sum of \$14,915.50, with interest thereon from December 20, 1880, and in the sum of \$8,837.76, with interest thereon from December 20, 1881, which, though payment has often been demanded, the defendant has failed and refused and still fails and refuses to pay

“Plaintiff further says that the defendant at all times during the years above mentioned, had in its possession, and now has, money and property belonging to its stockholders more than sufficient to pay all the sums of taxes so as aforesaid due from the said stockholders, but instead of applying the same or any part thereof, to the payment of said taxes, has paid over large portions of the same as dividends to the said stockholders, although the defendant has been repeatedly notified by the treasurer of said county, of the non-payment of said taxes; and notwithstanding the premises, the defendant has during all said years been transferring and permitting to be transferred from one person to another the stock thereof, as the stockholders therein have from time to time requested; and said defendant will, unless restrained by the order of this court, continue to refuse to pay said taxes, and will at the same time continue to pay dividends to stockholders of said bank and to transfer the stock thereof, to the great and irreparable damage of plaintiff.

“Wherefore plaintiff prays that defendant, its officers and agents be enjoined from paying to its stockholders, or any of them, any dividends, and from transferring on its book or otherwise any shares or share of its capital stock, until said taxes and interest shall have been paid in full, and that the court cause an account to be taken of the moneys and property in defendant's possession belonging to the several stock-

---

Miller, Treas. v. The First National Bank *et al.*

---

holders, and cause the taxes and interest as aforesaid due from them and each of them to be paid in full out of said money and property in defendant's possession, and for such other and further relief as may be just.

CHAS. EVANS,  
*County Solicitor.*

(Duly verified.)

The demurrer was sustained, and judgment rendered thereon for the defendant, which, on error, was affirmed by the district court; and this proceeding is prosecuted to reverse both judgments on the ground that the court of common pleas erred in sustaining the demurrer to the petition.

The cases of *Miller, Treasurer v. The Merchants' National Bank*, of Cincinnati, and *The same v. The Third National Bank*, numbered respectively 895 and 896, were argued and submitted with the case here reported.

*Foraker & Black, Little, Goss & Cohen*, and *Rufus B. Smith*, for plaintiff in error.

*John W. Herron*, for *The First National Bank*; *King, Thompson & Maxwell*, for *The Merchants' National Bank*, and *Lincoln, Stephens & Lincoln*, for *The Third National Bank*, defendants in error.

MINSHALL, C. J. It is evident that the relief prayed for against the stockholders in this case, can not be granted as they are not parties to the action; and, unless the plaintiff is entitled to some relief upon the facts stated against the bank, the demurrer to the petition was properly sustained.

And, as regards the bank, there is but one question in the case that needs to be determined, for the determination of it will dispose of all the others that have been raised; and that is, whether the shares of stock in a national bank are to be listed for taxation in the names of the shareholders or in the name of the bank? The power of the state to impose any tax upon such shares is conferred by the statutes of the United States, § 5219 Rev. Stats. This is not controverted. It is also true that the property of a national bank, other than its

realty, can not be subjected to taxation by a state or any of its subdivisions. The power conferred by the section just referred to, is to include the "shares" in the valuation of the personal property of the "owner" or "holder" of such shares. A bank does not own the shares of its capital; it owns the capital, and the shares are owned by its stockholders. The capital is corporate property; the shares in it are the individual property of its shareholders. It is the latter that may be taxed, and not the former. No authority is conferred to assess them for taxation against the bank itself; and to so assess them would be but another form of taxing the capital of the bank itself, which no one contends could be done without the authority of congress. A share in a bank is but a fractional part of its capital, owned by one who contributed an equivalent part of the capital, or his transferee; and the aggregate of all the shares held by individuals in a bank is equal to the aggregate of its capital. So that if all the shares in a bank were assessed for taxation in its name and payment of the tax required of it, the effect would be precisely the same as a tax upon the aggregate capital of the bank. Again, as the shares are to be assessed for taxation according to their true value in money, a tax so levied would extend to and include all the property of the bank—its personalty, in the valuation placed on the shares in its capital stock, and its realty, under the exception contained in § 5219 U. S. Rev. Stats. It seems, then, to follow, as a necessary result, that shares in a national bank must be assessed for taxation in the names of the owners of them, and not in the name of the bank itself. The language of the statute under which the power is conferred on a state to tax such shares, is such, and the power conferred must be confined to the language, or the exemption of the bank itself from taxation may be reduced to an empty expression.

Nor do the statutes of the state on the subject of taxation, contemplate or intend that such stock should be listed in the name of the bank. They contain special provisions for the listing of the shares of the stockholders in incorporated banks. They are required to be listed at their true value in money, and taxed in the city, ward or village where located, and not

elsewhere. The shares are not required to be listed by the shareholders themselves; this is done by the auditor of the county; and provision is then made for their equalization, and the hearing of complaints. To facilitate the enlistment of the stock and its valuation for taxation, the bank is required to keep in the office where its business is transacted a full and complete list of the names and residences of its stockholders and the number of shares held by each, open at all times during business hours to the inspection of all officers authorized to list or assess the value of such shares for taxation. § 2764 Rev. Stats. And then annually, at the proper time in the month of May, the cashier is required to make out and return to the auditor a duplicate report of "the resources and liabilities" of the bank, "together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each and the par value of each share." § 2765 Rev. Stats. This constitutes the listing of the stock for taxation, and is necessarily intended to be done in the names of the owners of it. No other reason can be perceived for the requirement that the names of the owners and the number of shares held by each, shall be returned to the auditor. Having been thus listed, the auditor is required to fix the total value of the shares according to their true value in money, and deduct therefrom the value of the real estate included in the statement of resources, as the same stands upon the duplicate. This is evidently required for the purpose of arriving at the true value of the shares themselves, and constitutes their valuation by the auditor for taxation.

Provision is then made for their equalization by the annual county board, and finally by the state board of equalization. And it is to be noticed, that a copy of the statement furnished by the cashier of the names of the stockholders and the number of shares held by each, as well as of the resources and liabilities of the bank, is, in each case, to be furnished by the county auditor, first to the county board, and then to the state board. And finally, on completion of the equalization by the state board, the Auditor of State is required, forthwith, to "certify to the auditors of the proper counties the valuation, as

equalized, of the shares of banks situated in such counties, which valuations shall be put on the proper tax-lists." § 2810 Rev. Stats. It is the "shares" that are required to be put upon the proper tax-lists. And as shares belong to their respective owners and not to the bank, it would seem a very reasonable construction to say that they are to be placed on the list in the names of their owners, and not in that of the bank, particularly in view of the fact, that they have been required to be listed, valued and equalized in the names of the owners.

Again, unless the shares are assessed for taxation in the names of the shareholders, there would be no opportunity given a shareholder to have a deduction in his favor for any *bona fide* indebtedness on his part; and to which he would be entitled under the decisions in *Whitbeck, Treasurer v. Mercantile National Bank*, 127 U. S., 193, 199; *Hills v. Exchange Bank*, 105 U. S., 319; *Supervisors v. Stanley, Id.*, 305.

But if any doubt remained upon this point, it is certainly removed by the provisions contained in § 2839 Rev. Stats., making the tax a lien on the shares, and providing a remedy in case of its non-payment. The section is as follows:

"Any taxes assessed on any shares of stock or the value thereof, of any bank or banking association, shall be and remain a lien on such shares from the first Monday of May in each year until such taxes are paid; and in case of the non-payment of such taxes at the time required by law by *any shareholder*, and after notice received of the county treasurer of the non-payment of such taxes, it shall be unlawful for the cashier or other officer of such bank or banking association to transfer or permit to be transferred the whole or any portion of said stock, until the delinquent taxes thereon, together with costs and penalties, shall be paid in full; and no dividend shall be paid on any stock so delinquent, so long as such taxes, penalties, and costs, or any part thereof, remain due and unpaid."

Each and every provision of this section contemplates an assessment upon shares in the name of the shareholder, and are inconsistent with any other practice. The lien is fastened on

---

Miller, Treas. v. The First National Bank *et al.*

---

the shares, and in case of the non-payment of the tax "by any shareholder," the consequence is visited upon him, and no one else. It is made unlawful for the cashier or any officer of the bank, on notice, to transfer or permit the transfer of his stock, or the payment of any dividends to him so long as the tax remains due and unpaid.

This view does not interfere with any arrangement by which a bank may, under the provisions of § 2840, Rev. Stats., as a matter of convenience to its shareholders and the public, agree to pay the taxes levied upon the stock of its shareholders, and deduct the same from dividends or other funds in its hands belonging to them. In such an arrangement the individual rights of shareholders are preserved, each being liable only for such taxes as may be assessed against stock held by himself. An agreement by the bank in such case to pay the taxes assessed against its shareholders might be enforced as any similar agreement. The assumption would be supported by its possession of funds, belonging to the party whose liability is assumed, and against which it would have the right to credit itself for the payment so made on behalf of the shareholder. Such an arrangement in no way infringes the exemption of the bank from state taxation, nor impairs its efficiency as one of the fiscal agents of the general government; and finds full support in the principles announced by the Supreme Court of the United States in the decision of *National Bank v. Commonwealth*, 9 Wall. 353; where a statute of the State of Kentucky, requiring the bank to pay a tax levied on the shares of its shareholders, was sustained, the tax being paid from funds of the shareholder in its hands, and not from the assets or capital of the bank.

What then was the nature of the suit brought by the treasurer against the bank? It was not for taxes that had been assessed against all or any of its shareholders, and which they or any of them had neglected to pay, and which it might have paid under the provisions of § 2840, Rev. Stats., making it lawful for the bank to pay the taxes, "assessed upon its shares \* \* \* in the hands of its shareholders respectively," deducting the same from any dividends that might be due or

become due upon the same. The substance of the petition is, that the cashier of the defendant, for the years named, made a return to the auditor, purporting to be a true return, of the resources and liabilities of the bank, but did not return any statement of the names of its stockholders with the amount of stock held by each, and, instead thereof, returned a written statement that it would pay the taxes for and on behalf of the stockholders; and that it paid the taxes in accordance with said return. That the auditor ascertained that the return was false, and, proceeding to correct the same, ascertained the amounts omitted for each year, placed the same on the tax-list against the bank, and, opposite thereto, the taxes on the amounts omitted for the several years included. For this we fail to find any authority. § 2782, Rev. Stats., applies to the case where an individual has made a false return of his property subject to taxation, and authorizes its correction by charging "such persons on the duplicate with the proper amount of taxes." The bank is not subject to taxation, and could therefore have been charged with nothing under this section. But an adequate remedy was provided for the case under § 2769, and constitutes the only remedy where a cashier makes a false return to the auditor. Under this section, the auditor may examine the books of the bank, and any officer or agent of it under oath, together with such other persons as he may deem proper, "and make out the statement;" and any officer of the bank may be fined not exceeding \$100, for failing to make the statement, or for willfully making a false one. This would seem to be as efficient as it is rigid for the purpose of securing true returns of bank shares for taxation.

A further claim is made that the bank being charged on the duplicate with the amount of these taxes, the duplicate is, under § 2859 Rev. Stats., *prima facie* evidence that the tax is due, and that the burthen is on the defendant to show that it is not. But that section applies only to the case where taxes "stand charged against any person" and are not paid as prescribed by law. As a national bank cannot be taxed by the state, the fact that it may stand charged with a tax upon the duplicate of a county, furnishes no ground for an action of any



---

Spence v. Emerine.

---

kind against it. If they stand charged against its stockholders, or any of them, then an adequate remedy for their collection is provided in § 2840 above referred to.

The argument based on the averment that the cashier stated in the return, that the bank would pay the taxes for and on account of its shareholders, cannot avail here. For conceding that this statement amounted to an agreement on the part of the bank to pay them, and that the agreement was a valid one, still it is averred that it did pay the taxes levied in accordance with the return, and the agreement had that extent, and no more. But it is apparent that the averment was made as setting forth part of the grounds on which the auditor acted in assuming to correct the returns that had been made by the cashier of the bank, and to charge it with taxes upon omissions for the years designated in the petition, and not as a ground for the recovery of a judgment against the bank for the breach of its agreement. No such judgment is prayed for, and whilst the prayer is no part of the cause of action, still it may be looked at for the purpose of construing the averments of the petition.

*Judgments affirmed.*

---

SPENCE v. EMERINE.

*Cognovit.*

1. A warrant of attorney to confess judgment should be strictly construed.
2. A warrant of attorney attached to a sealed note payable to the payee or bearer, authorized "any attorney at law, at any time after the above sum becomes due, with or without process, to appear for us in any court of record in the state of Ohio, and confess judgment against us, for the amount then due thereon, with interest and costs, and to release all errors and the right of appeal," *Held*:
  - (a) Such warrant of attorney conferred no authority to confess judgment against the maker of the note, in favor of the holder to whom the payee had transferred the note by delivery.
  - (b) In an action on the note, it was error to render judgment against the maker thereof in favor of such holder, by virtue of such warrant of attorney, without summons or other notice to the maker of the bringing of the action.

(Decided May 21, 1889.)

---

Spence v. Emerine.

---

**ERROR to the Court of Common Pleas of Sandusky County.**

The defendant in error, Andrew Emerine, to whom a sealed note, payable to E. S. Clark, or bearer, had been transferred by delivery, took a judgment thereon against the maker, John Spence, plaintiff in error, by confession, under a warrant of attorney attached thereto, at the September Term, 1887, of the Court of Common Pleas of Sandusky County.

The following is a copy of the note and warrant of attorney.

“\$250.00.

Springfield, O., Dec. 17, 1885.

“On the 1st day of Oct. 1887, I promise to pay to E. S. Clark, or bearer, two hundred and fifty dollars, for value received, with 6 per cent. interest from and after Sept. 1st, 1886, until due, and 8 per cent. after due; interest to be paid annually after maturity.

“And we jointly and severally hereby authorize any attorney-at-law, at any time after the above sum becomes due, with or without process, to appear for us in any court of record in the state of Ohio, and confess judgment against us, for the amount then due hereon, with interest and costs, and to release all errors and the right of appeal.

“Witness our hands and seals.

“JOHN SPENCE, [SEAL.]

“Post-office, North Hampton.”

By leave of this court, for the reasons set forth in the application of the plaintiff in error to file a petition in error, he filed such petition in error to reverse said judgment, and made the following assignment of error:

“Said court of common pleas erred in rendering judgment in favor of the defendant in error against the plaintiff in error, without summons or other notice of the bringing of said action, by virtue of a warrant of attorney attached to the note sued on in said case below, because said warrant did not authorize the confession of a judgment in favor of said defendant in error, and said common pleas court, therefore, had no jurisdiction over the person of the plaintiff in error.”

*Harrison, Olds & Marsh, Bowman & Bowman*, for plaintiff in error.

I. To authorize the confession of judgment in favor of the equitable transferee of a sealed promissory note, payable to the payee or bearer, by virtue of a warrant of attorney, the warrant must expressly authorize the confession of a judgment in favor of the transferee. That is to say, unless a warrant of attorney expressly authorizes the confession of judgment in favor of the payee of the note, or in favor of any holder thereof, the warrant is void for its uncertainty, or else it merely authorizes the confession of judgment in favor of the payee. *Osborn v. Hawley*, 19 Ohio, 130; *Marsden et al. v. Soper*, 11 Ohio St. 503; *Watson v. Payne*, 25 Ohio St. 340; *Cushman v. Welsh*, 19 Ohio St. 536; *Clements v. Hull*, 35 Ohio St. 141; *Reams v. Bank of Lima*, 2 Ohio C. C. Rep'ts, 43.

II. A warrant of attorney to confess judgment, which does not state in whose favor the judgment may be confessed, is void for its uncertainty. It is fatally defective for want of an essential term. This essential term cannot be supplied by intendment or presumption. The rule of strict construction of such warrants, has been repeatedly laid down and applied with a firm hand by the courts, including this court. *Cushman et al. v. Welsh*, and other cases before cited; 5 Hill, 497; 15 East. 592; 7 Taunt. 452; 61 Ill. 236; *Short v. Coglein*, 1 Anstruther, 225; *Henshall, Ex'r v. Mathews*, 1 Dowling's Pr. Rep. 217; *Foster v. Clagget*, 6 Dowling's Pr. Cases, 524; *Cowie, Ex'r v. Allaway*, 8 Dunf. & E. 257; *Lewis et al. v. Moon*, 1 Ohio C. C. R. 211; *Carlin v. Taylor*, 7 Lea (Tenn.) 666; *McDoal v. Yeoman*, 8 Watts. (Pa.) 361; *Lamaurieux v. Hewitt*, 5 Wend. 308.

III. But if the courts could aid, by intendment or presumption, the words of the power, they would not do so by liberal and extensive construction; but, on the other hand, they would only aid any omission or defect in its terms, by necessary implication, guided by the rule of strict construction.

Yet, even under the *liberal* rule of construction, there are as strong, if not stronger reasons for *presuming* the obligor in-

---

Spence v. Emerine.

---

tended the power to be exercised in favor of the obligee only. The obligee was the only other party the obligor had in mind at the time he entered into the obligation. The obligee was the person, and the only person, with whom the obligor dealt or contracted. A transfer of the note "by endorsement thereon," if made before the maturity of the note, would preclude any defense which the obligor might have at maturity. Can it be presumed that the obligor desired also to confer the further right upon *any transferee* to get judgment without process? It seems plain to us that the maker of such a note would much more likely intend that only the payee should have the right to take judgment without process; and that if the intention had been to confer such extraordinary right upon any transferee, the warrant would have so provided.

In this class of instruments, which may be, and in point of fact often are used to carry out schemes of fraud or oppression, and upon which judgments may be taken without notice, the courts do not apply a liberal rule, nor feel at liberty to give them such scope as the maker may be *supposed* to have intended; but, on the contrary, the courts go only so far as they are *compelled* by the express terms of the power, or by necessary implication. In many instances, these instruments are snares prepared to entrap the unwary. In the state of Illinois warrants of attorney or cognovit notes, have been abrogated by statute. The good citizens of the state got tired of this instrumentality of fraud and oppression, and the general assembly came to their relief.

*McCauley & Weller*, for defendant in error.

I. It was held in *Osborn v. Hawley*, 19 Ohio, 130, that a power of attorney to confess judgment, attached to a negotiable promissory note, when the note is transferred becomes inoperative and void.

The correctness of this holding was questioned in *Marsden v. Soper*, 11 Ohio St. 503.

The same question was made in *Watson v. Paine*, 25 Ohio St. 340. The court in this case did not seem to be fully agreed on the point, but McIlvaine, C. J., in the opinion p.

346, states some very obvious reasons why no such rule should be held.

In the later case of *Clements v. Hull*, 35 Ohio St. 141, it was held that a power of attorney, attached to a sealed note payable to bearer authorizing the waiving of process and the confession of judgment in favor of the holder of the note, may be executed in favor of an equitable owner and holder, to whom the note may be transferred by delivery, but without indorsement thereon.

The rule is therefore settled that the transfer of the note does not render the power void. That result would probably follow in the single case of the transfer of a note with a power attached to confess judgment for the payee only.

In the case before the court the note was a plain promissory note, payable to bearer, and while it was in fact under seal, the fact was of no consequence. The statute of April 14, 1884, Ohio L. 81, p. 198, abolished private seals, so that the note was negotiable by delivery.

If therefore, as held in *Clements v. Hull* above, it was competent to confess a judgment in favor of an equitable holder of a note, there could be no possible objection to confessing a judgment in favor of a person holding a note as this one was held, unless the power of attorney in this case is bad for uncertainty.

II. It is a well settled rule that formal instruments, such as powers of attorneys, are subject to a strict construction; that is, where powers are expressly limited to a specified person, or to be exercised in a designated court, county or state, or in favor of a certain person, or at a specified term of court, or in any other of the many ways in which they may be so limited, the courts restrain the exercise of the power within the limits clearly expressed.

Many instances of this kind may be found. The plaintiff in his brief has referred to quite a number of them. The only fair inference from these cases is, that the power conferred on a particular person must be exercised by him only. An examination of the cases in which a strict construction has been enforced will show, that where a power is expressly

limited, the court will not extend it beyond the limits expressed.

The power in this case authorized any attorney-at-law, with or without process, to appear for us in any court of record in the State of Ohio and confess judgment against us for the amount due hereon, etc.

There was a distinct authority here to confess a judgment against the maker. The authority was not limited to be exercised for any person, or class of persons. The exercise of this clear grant of authority necessarily implied that the judgment should be in favor of some person, or class of persons; some holder, either the payee or, as stated in the note, "the bearer;" some party in interest who might properly bring an action on the note.

The rule on this subject is clearly stated in Ewell's Evans on Agency, 145, (marginal).

Authority is clearly given in terms to confess a judgment against the maker of the note. That authority is not ambiguous or uncertain, either in terms or meaning. It is not easy to see how this authority could be exercised without confessing a judgment in favor of some holder of the note. A judgment must have been so confessed, as a necessary means of executing the authority so clearly given, with effect.

It does not follow that because the power necessarily includes the payee, it necessarily includes no one else.

If it includes the payee while he owns the note, it includes the transferee in the same sense when he becomes the owner of it. This results from the negotiable quality of the note, and the fact that the power follows it upon its transfer. The transferee therefore shows a *necessary* implication including him when he alleges ownership of the note with such a power attached to it.

DICKMAN, J. Although at common law a note under seal is not negotiable, either by delivery or indorsement, so as to enable the holder to maintain an action upon it in his own name, the sealed note now under consideration became negotiable by statute, unless its negotiability was destroyed by the

warrant of attorney attached to it. It is provided by section 3171 of the Revised Statutes, that all bonds and promissory notes, for a sum certain, and payable to any person or order, shall be negotiable by indorsement thereon; "and all such instruments payable to a person or bearer shall be negotiable by delivery." In this state, it is held that if the note is in itself certain and perfect, without conditions, it may remain negotiable, although the power of attorney to confess judgment attached to and forming a part of the note, may not, by its terms, operate in favor of an indorsee or transferee of the note. *Osborn v. Hawley*, 19 Ohio, 130.

Whether the warrant of attorney can be executed for the benefit of a holder of the note other than the payee, must depend upon the language of the warrant itself. But it is an established principle, that an authority given by warrant of attorney to confess a judgment against the maker of the note, must be clear and explicit, and strictly pursued, and we cannot supply any supposed omissions of the parties. *Cushman v. Welsh*, 19 Ohio St., 536; *Cowie v. Allaway*, 8 T. R., 257; *Henshall v. Matthew*, 1 Dowling's Pr. Cas., 217; *Foster v. Claggett*, 6 Dowling's Pr. Cas., 524; *The Manufacturers' and Mechanics' Bank of Philadelphia v. St. John*, 5 Hill, 497. In all cases of special agency, an agent constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceeds that power. The special authority must be strictly pursued. 2 Kent's Com., 621. And the same principle may be traced back to the Roman law, by which, when the authority was express or special, the agent was bound to act within it.

The plaintiff in error, in executing the note, might be presumed to have authorized an attorney to enter up a judgment against him in favor of the payee, when he would not be presumed to have consented to stand in the relation of judgment debtor to a stranger or adverse holder, to whom the payee might indorse or deliver the note. The maker might well insist upon a strict construction of the power granted, when the payee, by transferring the note before maturity, might preclude a defense which he might have at maturity. The power

---

Spence v. Emerine.

---

of attorney attached to the note in controversy, does not, in express language, authorize a confession of judgment in favor of any one, not even of the payee; but if such authority might be implied as to the payee, we cannot, under the rule of a strict interpretation, extend that implication in favor of the defendant in error to whom the note was transferred by delivery.

In *Osborn v. Hawley*, *supra*, as appears from a certified copy of the journal entry in the court of common pleas, upon which error was assigned, the warrant of attorney did not indicate in whose favor a judgment might be confessed, and it was held, that when the legal title to the note was transferred, such power of attorney became invalid and inoperative, and no authority whatever could be exercised under it for the benefit of the indorsee.

In *Marsden v. Soper*, 11 Ohio St. 503, the warrant of attorney under which judgment was confessed, purported to authorize such confession "*in favor of any holders of this obligation*," at any time after the same became due; but the court questioned, whether such a warrant of attorney would be legally operative, to authorize the confession of a judgment in favor of an indorsee of such note.

In *Cushman v. Welsh*, *supra*, the power was conferred by the terms of the instrument, to confess judgment only "*in favor of the legal holder of the note*," and it was decided that a warrant of attorney for the confession of such a judgment, did not authorize a confession of judgment on such note in favor of the owner and holder thereof, without an indorsement thereon by the payee, as provided by the statute, transferring the *legal* title to such owner and holder of the note.

In *Watson v. Paine*, 25 Ohio St. 340, the warrant of attorney attached to the note gave authority to appear in any court of record in the United States, and confess a judgment against the makers, "*in favor of the holder of the note*." The point was made in the case, that the warrant of attorney did not authorize the waiving of process, or an appearance for the makers, in an action brought by an indorsee of the note; in other words, that the power of attorney was not negotiable. The court did not find it necessary to decide the point, but



it was said by McIlvaine, J., in delivering the opinion of the court, "I am unable to find a reason why a power to confess judgment in favor of *any holder* of the note, may not as well be used in favor of an indorsee as in favor of the payee."

In *Clements v. Hull*, 35 Ohio St. 141, the scope of the power was not limited as in *Cushman v. Welsh*, *supra*, in favor of the *legal* holder only, but the authority given by the warrant of attorney was, "*to confess judgment in favor of the holder of said note.*" It was by virtue of such language in the warrant, that the court was of opinion, that the power authorizing waiver of process and confession of judgment might be executed in favor of an equitable owner and holder, to whom the sealed note—payable to a designated payee or bearer—had been transferred by delivery, without indorsement thereon as required by the statute.

It will thus be seen, that where it has been adjudged by the court that a power of attorney to confess a judgment may be executed in favor of a party other than the payee, it has been in cases where authority was expressly conferred to confess a judgment in favor of a *legal holder* or *holder* of the note. The decisions have all been based upon a strict interpretation of the power granted, without aiding any omission or defect in its terms by liberal intendment or construction.

In accordance with the views which we have expressed, our conclusion is, that the warrant of attorney attached to the note sued on, did not authorize a confession of judgment in favor of defendant in error, and there having been no summons or other notice to the plaintiff in error of the bringing of the original action, the court of common pleas acquired no jurisdiction over the person of the plaintiff in error, and erred in rendering a judgment against him.

We are therefore of opinion, that the judgment of the court of common pleas should be reversed, and the petition in that court dismissed without prejudice.

*Judgment accordingly.*

## VILLAGE OF CARDINGTON v. ADM'R OF FREDERICKS.

*Action for a nuisance—When abates.*

An action against an incorporated village founded upon a petition alleging in substance that a street much used by the citizens and the public, was so unskillfully and negligently constructed and left by the defendant as to be in an unsafe and dangerous condition, and allowed to become out of repair and obstructed by the rubbish and refuse of the village, so that it was highly dangerous, and that the plaintiff, while lawfully passing along the street, accidentally and without fault or negligence on her part, was precipitated down an embankment, whereby she was greatly bruised and injured, for which damages she asks judgment, is an action "for a nuisance" within the meaning of section 5144, Revised Statutes, and abates at the death of the party injured.

(Decided May 21, 1889.)

## ERROR to the Circuit Court of Morrow County.

Mary J. H. Fredericks commenced an action against the Incorporated Village of Cardington, in the Court of Common Pleas of Morrow County. After answer filed the plaintiff deceased, and, by leave of court, her administrator became party plaintiff, and filed petition. The sole issue in the case is, as to whether an action can be maintained on that petition, which is as follows :

" Mary J. H. Fredericks, *Plaintiff*,  
*against*  
 " The Incorporated Village of Cardington, Ohio, *Defendant*. }  
*Petition of James M. Sherman, Administrator.*

" And now comes the said James M. Sherman and represents :

" *First*—That on or about the 18th day of July, A. D. 1884, the said Mary J. H. Fredericks died intestate.

" *Second*—That on the 4th day of August, A. D. 1884, he, the said James M. Sherman, was by the Probate Court within and for the county of Morrow, Ohio, duly and legally appointed administrator of the estate of Mary J. H. Fredericks, deceased ; that he gave his bond as required by law as such administrator, and entered upon the discharge of said trust,

and that he is now the duly and legally appointed and acting administrator of said estate.

*Third*—That at the October term of this court, 1884, the death of the said Mary J. H. Fredericks was duly suggested. And by order of the court the administrator was made a party to said action, and leave given said administrator to file petition.

*Fourth*—That pursuant to said order of court, and leave to plead, the said administrator says that the said defendant is a municipal corporation, duly organized under the laws of the State of Ohio.

*Fifth*—That on or about the 28th day of April, A. D. 1883, a certain public street in said village, known as 'Main Street,' which was much traveled and used by the citizens of said village and the public generally, was so unskillfully and negligently constructed, and left by the defendant, as to be in an unsafe and dangerous condition, which street thus unskillfully and negligently constructed, was, by said defendant, allowed to become out of repair and obstructed by the rubbish and refuse of the village, so that the same became and was at the date last aforesaid highly dangerous. All of which the said defendant then and there had due and legal notice.

*Sixth*—That on the said 28th day of April, A. D. 1883, the said Mary J. H. Fredericks was lawfully traveling on said street, and while lawfully passing along said street, accidentally, and without fault or negligence on her part, was precipitated down an embankment, a distance of about twenty feet, whereby she was greatly bruised and injured.

*Seventh*—That the injury herein complained of, was wholly in consequence of the dangerous condition of said street, as herein set forth.

*Eighth*—That by reason of the premises she was damaged in the sum of five thousand dollars.

*Ninth*—That on the 10th day of November, A. D., 1883, she filed with the clerk of said defendant her claim for damages, as herein set forth, which said claim remained unadjusted for a period of sixty days and more prior to the commencement of this action.

"And yet the said defendant has not paid said sum of money, nor any part thereof, though often requested so to do.

"The said James M. Sherman, as administrator, as aforesaid, therefore prays judgment against the said defendant for the sum of five thousand dollars, with interest and cost of suit."

The court of common pleas sustained a demurrer to the petition, and dismissed the action. This judgment was reversed by the circuit court. To obtain a reversal of that judgment this proceeding in error is prosecuted.

*Powell, Owen, Ricketts & Black*, with *R. F. Bartlett*, and *J. K. Dunn*, for plaintiff in error.

Sec. 2640, Rev. Stats., provides that the council of municipal corporations "shall have the care, supervision and control of all public highways, streets, \* \* \* \* \* within the corporation, and shall cause the same to be kept open and in repair and free from nuisance."

The plaintiff in the original action complained of a nuisance in one of the streets of the village, and of a violation of a duty enjoined by the above section 2640, to keep the streets free from nuisance.

That to obstruct, etc., a highway is a nuisance, is a proposition too obvious to require authorities to support it.

"No one can have an action for a nuisance or obstruction in a common highway, without assigning some particular damage to himself individually, independent of the general inconvenience to himself as one of the public," etc. 1 Addison on Torts, sec. 279; *Columbus v. Jacques*, 30 Ga. 506; *Gerrish v. Brown*, 51 Me. 256; *Morton v. Moore*, 15 Gray (Mass.), 573; *State v. Spainhour*, 2 Div. & B. (N. C.) L. 547; *State v. Atchison*, 24 Vt. 448; *Dimmett v. Eskridge*, 6 Mumf. (Va.) 308.

Sec. 5144 Rev. Stats. provides that the following actions shall abate by the death of either party: Actions for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance, or against a justice of the peace for misconduct in office.

What is an action "for a nuisance"? It certainly can not

be an action to abate a nuisance. An action *for* slander, *for* assault and battery, etc., is certainly an action for damages resulting from the slander, the assault and battery, etc. By analogy, an action "*for* a nuisance" is an action for damages resulting from a nuisance.

The latter question ought to be set at rest by a brief reference to the history of this provision.

The Civil Practice Act of 1831 (Swan Stat. Ed. 1840), which was in force until the civil code was adopted, provided that "actions for libel, \* \* \* actions *on the case* for nuisance," etc., should abate by the death of either party. Upon the adoption of the code, there being no longer such a thing as an action on the case, these words were simply dropped out; but the nature of the action of course remained the same. It was an action for damages resulting from a nuisance.

*Andrews & Sims*, for defendant in error.

This is not an action that abates by reason of the death of the plaintiff. The petition states that the street was unskillfully and negligently constructed, and was unsafe and dangerous, and that without her fault, but by reason of the fault of the defendant, she was precipitated down an embankment twenty feet. See petition on page 17 of record. The obstruction complained of might or might not be a nuisance, and yet if the dangerous embankment had not been there, she would not have been injured by reason of the obstruction. Section 2640, Revised Statutes, is not meant for a trap to catch the unwary; and it is not the intent that the council of a corporation shall dig a pitfall in a public street, and bait it with a nuisance, and if by it, it succeeds in killing its victim, it escapes liability. Besides that, as was shown by the petition, it was the unsafe and unrepaired condition of the street that caused the injury.

SPEAR, J. The grounds urged for reversal of the judgment of the circuit court are:

1. The action was for a nuisance, and hence abated at the death of the party injured.

2. The petition did not state facts sufficient to constitute a cause of action.

Was the action below one for a nuisance? The *gravamen* of the petition is that the deceased was injured because of the dangerous and unsafe condition of the street along which she was traveling; that the street had been unskillfully and negligently constructed and left, was out of repair, and obstructed by rubbish and refuse. In other words, the charge is that the village constructed a dangerous road, and allowed it to become and remain out of repair, from which private damage ensued.

The term "nuisance" is of extended application. Many definitions are given, necessarily varied because the word applies to a large number of subjects. "The term 'nuisance,' derived from the French word '*nuire*,' to do hurt or to annoy, is applied in the English law indiscriminately to infringements upon the enjoyment of proprietary and personal rights." Addison on Torts, 361. "Nuisance, something noxious or offensive. Anything not authorized by law which maketh hurt, inconvenience or damage. It may be (a) *private*, as where one so uses his property as to damage another's, or disturb his quiet enjoyment of it; (b) *public*, or *common*, where the whole community is annoyed or inconvenienced by the offensive acts, as where one obstructs a highway, or carries on a trade that fills the air with noxious and offensive fumes." Cochran's Law Lexicon, 192.

We presume it can hardly be doubted that the street, as described in the petition in this case, was, in law, a nuisance. "Nuisances to highways, bridges and public rivers. These annoyances may be either *positive*, by actual obstruction, or *negative*, by want of reparation. In the latter case, only those persons are liable whose duty it is to keep the road, etc., in repair." Harris' Criminal Law, 118. "Defective highways a nuisance.—For the communities, individuals or corporations, upon whom is imposed the burden of keeping a highway in repair, to permit the same to be out of repair so as to endanger the safety of persons or property passing over it, or so as seriously to interfere with convenient transit over the same, is a public nuisance at common law, subjecting the com-

munities, persons or corporations, upon whom the duty of keeping it in repair is imposed, to indictment, and generally to damages at the suit of persons injured by reason of such defects or want of repair." Wood on Nuisances, section 307.

We conclude that the generally accepted rule is, that although the nuisance be a public one, yet it is private also, if an individual sustain a special injury thereby, and he may maintain an action and recover his special damage, whether it be direct or only consequential.

This petition then charged the maintenance of a nuisance. It charged that by reason of that nuisance the plaintiff's intestate had been injured. It is insisted that the action below was for negligence. This proposition does not seem to advance the argument. The maintenance of any nuisance implies negligence, or worse. The negligence averred produced a nuisance, and it was the nuisance which was the occasion of the injury. Any failure to keep a safe highway implies neglect, but it was necessary to allege a state of facts from which the negligence would be inferred. Averring such state of facts showed that a nuisance had been created, but it was not necessary that the word "neglect" or "negligence," should be used in the petition. The action was, therefore, "for a nuisance," *i. e.*, for maintaining a nuisance from which private damage ensued.

The statute (sec. 2640, Rev. Stats.), gives to municipal corporations the care, supervision and control of all public highways, etc., and requires that the same shall be kept open, and in repair, and free from nuisance. In effect it is a requirement that the corporation shall prevent all nuisances therein, and when, by allowing a street to become so out of repair as to be dangerous, the corporation itself maintains a nuisance, and a suit to recover for injuries thereby occasioned, is for damage arising from a nuisance, or "for a nuisance." The statute does not give a remedy; it but enjoins the duty. And when a duty to keep streets in repair is enjoined on municipal corporations, either by a statute in the form now in force, or by a provision which authorizes them to pass ordinances for regulating streets and keeping them in repair, and

gives power to levy taxes for that purpose, and presumably, to obtain a fund for satisfying claims for damages, a right of action for damages caused by such neglect, arises by the common law.

Did the action abate by the death of the person injured? As a general rule, at common law, actions *ex contractu* survived, while actions *ex delicto* did not. To this there were exceptions. One was that, in actions *ex delicto*, so far as the act complained of resulted in damage to property, the action survived. Another was, that though the action was founded on contract, as a suit for breach of promise of marriage, yet if the damage resulting was to the person, and not to the property, the action did not survive. The reason for the distinction was stated by Lord Ellenborough, in *Chamberlain v. Williamson*, 2 M. & S. 408, thus: "Executors and administrators are the representatives of the temporal *property*, that is, *the debts and goods of the deceased*, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate." In other words, the pain and suffering endured, or the impairment of the body, not being a property interest, did not pass to a personal representative. Nor were such causes assignable. The rule was that "demands arising from injuries strictly personal, whether arising upon tort or contract, are not assignable." *McKee v. Judd*, 12 N. Y. 622. "A chose in action which is transmissible to an executor or administrator, under our law, is assignable in equity; but personal torts, which die with the person, are not assignable." *Grant v. Ludlow*, 8 Ohio St. 37. Survivability and assignability of things in action were thus treated as convertible terms. "In general, it may be affirmed that mere personal torts, which die with the party, and do not survive to his personal representatives, are not capable of passing by assignment." *Comegys v. Vasse*, 1 Pet. 213.

In this view, at common law, no action for death occasioned by wrongful act could be maintained. No right was transmitted, because no person has such an interest in his own life as will constitute property in any legal sense, and property rights only were transmissible. Hence followed the enact-



ment of statutes in many of the states, including our own, giving a right of action for death occasioned by wrongful act, in the name of the personal representative, for the benefit of the next of kin, or widow, or both. It will be noted that it nowhere appears that the death in this case was caused by the injuries complained of, nor does the petition of the administrator purport to be founded on the statute referred to.

So that when our statute provides that actions for damages for slander, libel, assault and battery, on the case for nuisance, etc., shall abate by the death of either party, it but gives legislative expression to a rule of the common law. A change made by the adoption of the code is important to notice. Previously the statute caused such action to abate by the death of either party. The code, sec. 399, provided that such action should abate by the death of *the defendant*. The present statute, sec. 5144, Rev. Stats., which took effect January 1, 1880, restored the original language, and provided that the actions, therein enumerated, including actions "for a nuisance," should abate on the death of *either party*. The injury to the party in this case occurred April 28, 1883.

The question is not without difficulty, and much may be said on the other side, but, as conclusion, upon the grounds stated, we think the action abated upon the death of plaintiff by force of sec. 5144.

By reason of the conclusion reached on the first proposition, the other becomes unimportant. However, we are of opinion that, but for the effect of sec. 5144, the petition would not have been bad on demurrer. It is not a model of definiteness, perhaps, but the remedy for such defect is by motion, and not by demurrer.

*Judgment of the circuit court reversed, and that of the common pleas affirmed.*

## WEIL v. THE STATE.

*Conditional sales of personal property—Constitutional law.*

1. The act passed May 4, 1885 (82 O. L. 238), entitled "an act to regulate conditional rates and sales of personal property, and to provide for filing instruments pertaining to the same with certain officers, and making a violation thereof a misdemeanor," is not in conflict with either section sixteen or nineteen of article one, or section sixteen or twenty-eight of article two, of the constitution of this state.
2. The second section of the act, which makes it unlawful for the vendor of personal property sold as therein specified, to take possession of such property, without tendering or refunding to the purchaser, the sum paid by him, "after deducting therefrom a reasonable compensation for the use of such property," is not invalid on the ground that the amount of such compensation is uncertain, and no method is provided by the act for determining the same.

(Decided May 21, 1889.)

MOTION for leave to file petition in error to reverse the judgment of the Circuit Court of Hamilton County.

The facts sufficiently appear in the opinion.

*Baker & Goodhue*, for the motion.

*Swartz, Littleford & Wright*, contra.

WILLIAMS, J. At the April term, 1888, of the Court of Common Pleas of Hamilton County, Sol. Weil was indicted for a violation of the act of May 4, 1885 (82 Ohio L. 238) entitled "An act to regulate conditional rates and sales of personal property, and to provide for filing instruments pertaining to the same with certain officers, and making a violation thereof a misdemeanor." After a demurrer filed by him to the indictment had been overruled, he entered a plea of guilty; and sentence being then passed upon him as provided by the statute, he prosecuted error to the circuit court, where the judgment was affirmed. The motion for leave to file a petition in error in this court, is submitted, it is said in argument, "to test the constitutionality of the statute."

It is first suggested, rather than contended, that the act is without force, because that clause of Section 16 of Article II of

the constitution, which provides that "no bill shall contain more than one subject which shall be clearly expressed in its title," has been disregarded. If it were true, that in the enactment of this statute, the legislature failed to observe the constitutional provision referred to, the statute would not, on that account, be invalid. According to the repeated decisions of this court, that provision of the constitution relates only to bills in their progress through the general assembly, and is directory merely, being a rule prescribed for that body, to which the supervision of its observance is left. *Pim v. Nicholson*, 6 Ohio St. 176; *State v. Covington*, 29 Ohio St. 102; *Oshe v. State*, 37 Ohio St. 494. The suggestion of the invalidity of the statute on this ground, therefore, does not demand further consideration.

To the first section of the statute, no objection is made. That section in substance provides, that in all cases where personal property is sold to be paid for in installments, or let, hired or delivered subject to a condition that the title shall remain in the vendor, lessor, hirer, or deliverer, until payment of the sum or amount agreed on therefor, the condition shall be void as to subsequent purchasers, mortgagees in good faith, and creditors, unless it is in writing, and verified and filed as chattel mortgages are required to be. The second and third sections of the act are as follows :

"SEC. 2. Whenever such property is so sold or leased, rented, hired or delivered, it shall be unlawful for the vendor, lessor, renter, hirer or deliverer, or his or their agent or servant, to take possession of said property without tendering or refunding to the purchaser, lessee, renter, or hirer thereof, or any party receiving the same, the sum or sums of money so paid, after deducting therefrom a reasonable compensation for the use of such property, which shall in no case exceed fifty per cent. of the amount so paid, anything in the contract to the contrary notwithstanding, and whether such condition be expressed in such contract or not, unless such property has been broken or actually damaged, and then a reasonable compensation for such breakage or damage shall be allowed.

SEC. 3. Any person violating any of the provisions of section two of this act, shall be deemed guilty of a misdemeanor,

and on conviction thereof, shall be fined in any sum not more than one hundred dollars."

These two sections, it is contended, violate, (1) that clause of section twenty-eight of article two of the constitution which denies to the general assembly power to pass laws impairing the obligation of contracts; (2) the section of the bill of rights declaring the inviolability of private property; and (3) those provisions of the constitution which vest the judicial power of the state in courts, and require that "all courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law."

1. Does the statute impair the obligation of contracts? It does not in terms purport to operate retrospectively, or apply to contracts entered into before its enactment, but only to those made after it took effect. The obligation of a contract, is the duty, which the law at the time of making it, imposes upon the parties. As was said by Mr. Justice Washington in *Ogden v. Saunders*, 12 Wheat. 213, "the law of the contract forms its obligation." Judge Cooley, in his work on Constitutional Limitations, p. 346, says: "The obligation of a contract depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by one party, and the right acquired by the other." In an interesting discussion of this subject in *Smith v. Parsons*, 1 Ohio, 236, it is said by Burnett, J., in the opinion of the court, that, "The legislature has a right, by law, to regulate contracts, to determine their effect, and point out the mode of their discharge. These laws are applied to all subsequent engagements. and fix the rights of the parties at the very instant the contract is closed, so that the contract, in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it. It continues what it was at its commencement; and it is more correct to say that the law has in part made the contract, than that it has changed it." Persons contracting after the passage of the statute, could not know the

law as one impairing the obligation of contracts in the sense of the constitution, but as an act regulating future contracts, and defining their effect. The learned judge further says: "Instead of determining the validity of the statute by reference to the alleged intention of the parties to the contract, we must fix the legal intent of the parties, as well as the nature and extent of the obligation of the contract, by reference to the statute." And again: "Contracts must be expounded according to the law in force at the time they were made; and the parties are as much bound by a provision contained in a law, as if that provision had been inserted in, and formed part of the contract." The application of the law thus stated, to this case, leaves little ground for the contention that the statute in question is obnoxious to the constitutional objection under discussion. The act was passed May 4, 1885, and took effect on the 1st day of July, 1885, while the offense charged in the indictment, is that Weil, having on the 9th day of November, 1887, sold and delivered certain personal property to another, to be paid for in installments, on the 18th of February, 1888, unlawfully took possession of the property, without tendering or refunding any of the money paid him by the purchaser therefor. The contract of sale was made subsequent to the passage of the statute, and if as before seen, the statute entered into and became part of the contract when Weil sold and delivered the goods, in the manner specified in the act, he thereby agreed, as much so as if expressly stipulated in the contract, that he would not, and rightfully could not take possession of them without complying with the provisions of the statute; and, having so agreed, neither compelling such compliance on his part, or holding him responsible for his failure in that behalf, in any way impairs the obligation of the contract. Rather, effect is thus given to it, and its obligation enforced, according to its terms.

2. The next objection made to the statute is, that it violates the right of private property, by undertaking to transfer it to another, without the owner's consent. Before the enactment of the statute, it had been held that upon sale and delivery of chattels to be paid for in future installments, it was competent

---

Weil v. The State.

---

for the parties to contract that until full payment, the title to the property should remain in the vendor, and on failure to make such payment, the vendor might take possession of the goods, and all money paid thereon should be forfeited to him ; and that under such sales, no title vested in the vendee, until he paid the entire contract price, and a *bona fide* purchaser from him acquired no title. *Sanders v. Keber*, 28 Ohio St. 630. Oppression and hardship might, and probably did grow out of such contracts. Under them, a purchaser might pay the purchase price for the goods, except an insignificant sum, and failing, for any cause to pay that, the vendor could reclaim the property, and retain the whole amount paid, thus depriving the purchaser of both the property and money. Consequences like these, no doubt, directed the attention of the legislature to the establishment of some equitable rule of adjustment between parties to such contracts. At all events, that body has deemed it proper, by the statute in question, to regulate contracts of this class, and prescribe their effect, by limiting the amount of forfeiture, a vendor may exact under them. This, as has already been shown, the legislature may do. The statute, when applied to contracts made after its adoption, does not divest the owner of his property without his consent ; for, of course, if the purchaser shall pay the full purchase price of the property, it becomes his by the agreement of the seller, and the latter has what he agreed to receive for it, its equivalent in money ; and, in case the purchaser fails to fully pay for it, the vendor's right of property is preserved to him, with a reasonable compensation for its use by the vendee, and for any damage done to it. After the enactment of the statute prescribing the effect of the contracts specified in it, and fixing the rights of parties thereto, the defendant was at liberty, to enter into such a contract, or not ; and having entered into it, the provisions of the statute prescribing his rights, duties and liabilities under it, became obligatory upon him of his own choice ; and if it should follow, that by reason of the limit fixed by the statute upon the amount of the purchase money he may retain and at the same time reclaim his property, he is deprived of some-

thing he might otherwise have exacted, it is the result of his contract to that effect, into which he voluntarily entered.

3. Again, it is contended that the statute deprives the party of his remedy by due course of law. The position taken by counsel for the motion is, that in effect, the statute prohibits the seller from maintaining an action to recover possession of the property sold, without an ascertainment first had of the amount of compensation to be paid for the use of the property by the purchaser, and, in case the property is damaged, of the amount of damages to be paid, and that, if the parties disagree upon either question, there is no tribunal provided for its determination, and he can not, therefore, have recourse to his legal remedy, without incurring the penalty of the statute, and is thus denied remedy by due course of law. This position we think, is untenable. The offense punished by the statute, is committed by a vendor, only when he, or his agent, or servant, takes possession of the property, in violation of its provisions. The institution of a suit in replevin, to have determined by judicial decision, the party's right to the possession of the property, is not taking possession of the property by the vendor in violation of the statute. While it is true, he may thus receive the possession of the property, he does so, only on legal process, and not until he shall have given an undertaking as required by law, which takes the place of the property, and secures to the defendant the full value of his interest in the property, which is the amount due him under the provisions of the statute. This amount, may be regarded either as his interest in the property, or the extent of his lien upon it, and may be ascertained and secured to him by the verdict and judgment in such action. By force of the statute, his right of possession in the property continues until the seller shall tender or refund to him the sum paid on it, after deducting a reasonable compensation for its use, and for the damage done to it; while, under the provision of the replevin statute (sec. 5826, Rev. Stats.), if the jury find that the defendant had the right of possession at the commencement of the suit, they shall assess to him such damages as they think right and proper, for which, with costs of suit, the court shall render judgment for the defendant.

4. It is further contended that the act is unconstitutional, because it is an attempt by penal enactment to assist in the collection of a debt, the debt itself being wholly the creation of the statute. This objection is somewhat indefinite, and it is sufficient to say respecting it, that courts do not declare statutes unconstitutional because they may regard them unwise or mischievous. The necessity of their enactment, and the policy of their provisions, alike belong to the law making power. The legislature has deemed it proper, to make it a misdemeanor, for a vendor, in the cases specified in the statute, to take possession of property contrary to its provisions, and there appears to be no obstacle in the constitution to such legislation, so long as the act violates no provision of the bill of rights. Adopting in this case, the language of White, Judge, in *Morgan v. Nolle*, 37 Ohio St. 23, "the only limitations to the creation of offenses by the legislative power, are the guaranties contained in the bill of rights, neither of which is infringed by the statute in question."

5. Finally it is claimed, that the second section of the act, which makes it unlawful for the vendor of personal property sold as therein specified, to take possession of such property, without tendering or refunding to the purchaser the sum paid by him, after deducting therefrom a reasonable compensation for the use of such property, is invalid, because the amount of such compensation is uncertain, and, where the parties do not agree, no method is provided by the act for determining the same. We are of opinion that it is not. What is a reasonable compensation under the statute, is no more uncertain than the reasonable value of services, in an action on a *quantum meruit*; and, if the parties are unable to agree upon the amount, it must be settled like other disputed questions of fact.

*Motion overruled.*



## GOINS v. THE STATE.

*Peremptory challenges of jurors by the defendant in a criminal case—Number allowed—Qualifications of jurors in criminal cases—An aider and abettor of the crime of murder—Conviction of, although principal convicted of manslaughter only—Conspiracy—When declarations of co-conspirators admissible—Mob—When cries of admissible—Self-defense—When numbers may combine for.*

1. A defendant in a criminal trial is only entitled to two peremptory challenges unless he is on trial for a capital offense. And the fact that he had been indicted for murder in the first degree; that a jury of thirty-six had been summoned and were in attendance for his trial; that a *nolle* was then entered as to the charge of murder in the first degree; and that a jury to try him for murder in the second degree was being impaneled from the thirty-six jurors so in attendance, did not enlarge his right in this respect.
2. (a) A juror who states on his examination that he has formed an opinion on a matter affecting the guilt of the defendant, from having heard the circumstances of the crime related by one who claimed to know them, may nevertheless be competent to sit as a juror if he says on oath that he believes he can render an impartial verdict in the case, and the court is satisfied he can do so.  
(b) The fact that the court admitted him to sit as a juror is a sufficient finding that it was satisfied he could render an impartial verdict.
3. One indicted as an aider and abettor of the crime of murder may be placed on trial, convicted and sentenced for that offense, notwithstanding the principal offender had been tried previously, and convicted and sentenced for manslaughter only.
4. (a) On the trial of one of several defendants jointly indicted for an offense, the declarations of a co-defendant, made in the absence of the defendant on trial, in furtherance of the common purpose, are admissible when a *prima facie* case of conspiracy has been made.  
(b) To authorize the admission of such evidence, an express averment in the indictment, of the fact of a conspiracy, is not necessary.  
(c) Nor need the conspiracy be one to commit the identical offense charged in the indictment, or even a similar one; it being enough that the offense charged in the indictment was one which might have been contemplated as a result of the conspiracy.
5. On the trial of one charged with homicide, where the defense is that the killing was done in resisting an attack from a mob, the cries of the mob from the time it was formed, though made before the deceased joined it, are competent evidence to prove its spirit and purposes, and as reflecting upon its attitude at the time the alleged attack was made.
6. Where a number of persons, in the exercise of their lawful rights, have reason to apprehend an immediate, violent and criminal assault upon them as a party from superior numbers, it is not unlawful for them to combine for their just defense.

46	457
50	222
46	457
70	16

---

Goins v. The State.

---

7. Where one is on trial for homicide, and is defending on the ground that the killing was done in repelling the attack of a mob, he has a right to prove, and have the jury consider, the violent, malicious and criminal acts and declarations of the mob.
8. In the absence of proof of a conspiracy, one, who is present when a homicide is committed by another upon a sudden quarrel or in the heat of passion, is not guilty of aiding and abetting the homicide, although he may become involved in an independent fight with others of the party of the deceased, unless he does some overt act with a view to produce that result, or purposely incites or encourages the principal to do the act.

(Decided May 21, 1889.)

**ERROR to the Court of Common Pleas of Allen County.**

At the April term, A. D. 1888, of the Allen County Court of Common Pleas, William Goins, the plaintiff in error, was jointly indicted with three others for aiding and abetting one Frederick Harrison in the deliberate and premeditated murder of Patrick Hughes, on the night of April 2, 1888. At a later period of the term the principal was tried for murder in the first degree, but convicted and sentenced to the penitentiary for manslaughter only.

At the following October term of the same court the plaintiff in error was placed upon trial, convicted of murder in the second degree and sentenced to the penitentiary for life. During the trial he, by his counsel, excepted to certain rulings of the court that were embodied in a bill of exceptions which set forth all the evidence, the charge of the court, and all the other proceedings in the case, from which it appears that the killing occurred on "Main," one of the principal streets in the city of Lima, Ohio, on the evening of the day of the spring election for the year 1888; that during the evening, that street and the saloons along it were thronged with men, waiting to learn the result of the election, among whom were the plaintiff in error and the four men who were indicted with him—all of whom were colored. One of the colored men, Frank Crowder, was intoxicated, and was about to engage in a fight with a white man named Casey, but was held back and taken away by Goins. After this, these colored

---

Goins v. The State.

---

men walked back and forth along Main and other streets, going in and out of the saloons; not always in a body, and at times one or more of them in company with one or more of some three or four other colored men who were about during the evening. No further quarrels were had, though some of the colored men used expressions indicating animosity towards the "Irish boys," as the white crowd was called. About 8 o'clock, P. M., as the colored men went north on Main street, they were followed by a crowd of men, which in the evidence is called the "Irish boys." This crowd, expressing dislike towards the colored men, kept increasing as it progressed. It soon began gathering stones, and, overtaking the colored men, the fight began, without any quarrel or interchange of words between the parties. Patrick Hughes joined the white crowd, but was not shown to have done any act of violence. There was no evidence of any ill will on the part of the colored men towards him personally, or towards any other member of the white crowd except Casey, and no other evidence of ill will towards him except what may be inferred from the affray between the colored man Crowder and him in the early part of the evening. Nor was there any evidence of any purpose or conspiracy by the colored men to do any injury to any particular individual of the white crowd. Whatever feeling the colored men expressed throughout the evening, was towards the Irish generally, by whom they were outnumbered in the proportion of about twenty to one.

Any further facts necessary to understand the questions decided will be found in the opinion of the court.

*James L. Price and J. W. Halphill, for plaintiff in error.*

*Isaac S. Motter, pros. atty. and T. D. Robb, for the state.*

BRADBURY, J. The plaintiff in error, William Goins, was indicted for aiding and abetting murder in the first degree; the day set for his trial having arrived, there was in attendance a panel of thirty-six jurors, from which a jury to try him was to be selected as the statute in such case provides. Thereupon the prosecuting attorney, by leave of court, en-

tered a *nolle prosequi* to the charge of murder in the first degree. The court then proceeded to impanel from the thirty-six jurors in attendance on the case, a jury for his trial. To this no objection was offered; but after plaintiff in error had peremptorily challenged two jurors, and his challenge of Christian Stettler had been overruled, as will hereafter appear, he peremptorily challenged him; the court, however, holding the prisoner to be entitled to only two peremptory challenges, overruled this challenge, and Stettler sat as a juror in the case; to all of which the plaintiff in error excepted.

The right of peremptory challenge is to be determined by the provisions of sec. 7272, Rev. Stats., as amended in 1888, (84 Ohio L. 86), together with those of sec. 7277. Section 7272 as amended, reads: "Every person indicted \* \* \* (for a capital offense) \* \* \* shall be entitled to challenge sixteen of the jurors peremptorily." 84 Ohio L. 86. And sec. 7277 provides, that "except as otherwise provided \* \* \* every defendant may peremptorily challenge two of the panel." It is only "otherwise provided" in capital offenses, so that, except in capital cases, the defendant in a criminal case is only entitled to two peremptory challenges. After the *nolle* had been entered to the deliberation and premeditation charged in the indictment, the prisoner did not stand indicted for a capital offense; the charge against him was reduced to aiding and abetting murder in the second degree, and his right of challenge was governed by sec. 7277, Rev. Stats. That the jury had been drawn and summoned under sec. 7267, Rev. Stats., made no difference in this respect. He may have been entitled to be tried by a jury drawn and summoned in the usual way if he had so demanded; but whether he was or not, as he did not choose to exercise the right, his neglect to do so did not enlarge his right to peremptory challenges, this right being determined by the offense charged against him, and not by the manner in which the jury had been brought in. In this ruling of the court we see no error.

Christian Stettler was called and examined touching his qualifications as a juror in the case. He stated that the father of the deceased had talked with him about the killing, and

went into the particulars of the transaction as if he knew the facts: that he had also read of the case in a newspaper, and had formed an opinion respecting the guilt of the principal. Thereupon the defendant challenged him for cause. The court then, as the statute directs, inquired further of the juror, who stated that he believed he could render an impartial verdict in the case, and that he could do so even if the principal were on trial. The challenge was then overruled, and the prisoner excepted.

In respect of challenge for cause, sec. 7278, Rev. Stats. as amended (81 Ohio L. 54), provides: \* \* \* "if a juror has formed \* \* \* an opinion, \* \* \* the court shall thereupon proceed to examine such juror as to the grounds of such opinion; and if such juror shall say that he believes he can render an impartial verdict notwithstanding such opinion, and if the court is satisfied that such juror will render an impartial verdict on the evidence, it may admit him as competent to serve in such case as a juror."

The court did not expressly find that it was "satisfied" that the juror could render an impartial verdict in the case, but the fact of admitting him as a juror must be taken to include, by necessary implication, a finding by the court that it was satisfied of his impartiality. Upon no other ground could the court legally admit him as a juror.

The trial court had before it the juror and his statements. We have these statements embodied in a bill of exceptions, from which it appears not only that the juror had read an account of the case in a newspaper, but had received from the father of the deceased, a narrative of the circumstances of the homicide, and had at one time formed an opinion respecting the guilt of the principal. Under that state of fact, to admit him as a juror was an extreme application of the discretion permitted by the statute; yet, standing by itself, it is not such an abuse of that discretion as to warrant a reversal of the judgment on that ground alone; but in view of the difficulty nearly all men experience in getting rid of opinions based upon hearing a detail of the circumstances of a transaction by one who professes to know them, it might well become an im-

portant factor in the case, were we reviewing the whole record to ascertain if a fair trial had been had and substantial justice done.

3. The principal in the homicide having been convicted and sentenced for manslaughter, the prisoner moved the court to order that he should not be put upon trial for a higher degree of offense; and in support thereof, introduced the record of the trial, conviction and sentence of the principal. The motion was overruled, and the prisoner tried and convicted of murder in the second degree. Whether this question could be raised *in limine* by a motion, we need not stop to enquire, for the record discloses the result of the trial of the principal, and the motion for a new trial brought the question again before the court.

The precise question whether in the case of a crime admitting of degrees of guilt, where the principal offender has been tried and convicted of one of the lower degrees, one indicted with him as an aider and abettor can afterwards be tried and convicted of one of the higher degrees of the crime, has never been decided by this court; but cases decided by it can be found, which, in their principle, determine the question.

The statute relating to aiders and abettors, provides that "Whoever aids, abets, or procures another to commit any offense, may be prosecuted and punished as if he were the principal offender." Rev. Stats. sec. 6804.

Under this statute, or others like it in this respect, aiding, abetting or procuring a crime to be committed has been held to constitute a substantive offense, and that the aider, abettor or procurer, might be tried before the principal offender. 19 Ohio, 131; 18 Ohio St. 496; 37 Ohio St. 178. If, as has been held, this crime is a substantive one, for which the offender may be tried and convicted before the conviction of the principal, it necessarily follows that he should be convicted of that degree of the crime which the evidence against him establishes; and if this may be done before, no reason is apparent why it should not be done after the trial of the principal; and the circumstance that the principal offender, through failure of proof or caprice of the jury, had been convicted of a lower

grade, or even acquitted, before the aider or abettor was put on trial, cannot affect the question of the guilt or innocence of the latter. The degree of the guilt of the aider and abettor, as well as the question whether he is guilty at all, is to be determined solely by the evidence in the case, and the record of the trial of the principal is not competent evidence for either of those purposes. We therefore hold that it was not error to place the prisoner on trial for a higher grade of the offense than that of which his principal had been convicted.

4. The court on the trial admitted in evidence, over the objection of the plaintiff in error, certain declarations of one Samuel Thomas, who was jointly indicted with him, but not then on trial. The exception to the ruling of the court in admitting evidence of these declarations, as to all except two of them, may be disposed of on the ground that they were made in the presence of, or so near to the plaintiff in error that he must be held to have heard them. The two others having been made under similar circumstances, only one of them will be noticed, that testified to by Wallace Standish, which is as follows: "If we get them we will give them hell." Its admissibility depended upon its having been made by a co-conspirator in furtherance of the common purpose. Much latitude is necessarily left to the trial court in determining whether or not there has been introduced sufficient *prima facie* proof of a conspiracy, to admit evidence of the acts and declarations of one claimed to be a co-conspirator with the defendant on trial. In the case at bar there was some evidence of a common purpose among the colored men; whether it extended beyond a purpose to exercise the right to pass along the public streets of the city may admit of grave doubt; but the determination of that question is not necessary to determine the question of the admissibility of the evidence. There being some evidence of a common purpose, the declarations of a co-conspirator in furtherance of it was competent evidence, and the court did not err in admitting it to go to the jury. Counsel contend, that to render the acts and declarations of a co-conspirator competent evidence, the indictment should have, in express terms, charged a conspiracy. This is true where the act of conspiring

is itself the crime charged; but where some other act is the real offense, and the conspiracy is a common purpose leading to the commission of the main criminal act, a conspiracy need not be alleged in express terms, and if any allegation in respect thereof is at all necessary, the charge in the indictment that it was jointly done is sufficient for that purpose.

5. The plaintiff in error offered to prove certain cries or exclamations of the white or Irish crowd, by which, as he claimed, he and his fellow colored men were subsequently attacked; they were excluded and he excepted.

It was the night after the April election, and a large crowd of people, mostly white, had assembled about and between the post office and the De La Flora saloon, two well known points in the city of Lima. Some colored men, not shown to have exceeded ten or twelve, were about in the crowd, some four or five of whom had been passing along the street in and out of the saloons and through the crowd, and by something in their bearing, or reported sayings, seem to have excited the animosity of the white portion of the crowd. One of them was drunk, and perhaps one or more of the others showed some slight effects of liquor. A policeman had ordered them to go home. They started north on Main street, and had gone a short distance, estimated from twenty to thirty yards, when a party, estimated to contain from twenty to thirty or more young white men, mostly Irish, started after them. At this point plaintiff in error offered to prove that some of this party cried out: "There go the black sons of bitches; let's follow and give them hell." Daniel Steinour then testified that he met the colored men, four in number, about a square further north, near what he called "Rush's tin shop;" that behind them was the white party, increased to from fifty to seventy-five in number, some of whom were gathering stones; that the white party went on north at a pretty lively gait, and soon after he saw the crowd moving back and forth among themselves, and heard the rattle of stones. The plaintiff in error proposed to prove by the witness that cries, similar to those he before offered to prove, came from the white party as they were gathering the stones. In both instances, above re-



ferred to, the evidence was rejected by the court, and exceptions taken. The state claims in argument that the first cries occurred too long before the homicide to be admissible, and the last after it was in fact committed, and that they on those respective grounds, were properly rejected. The claim is not borne out by the bill of exceptions. No doubt there is some uncertainty respecting the exact order in which events occurred that night, which is greatly intensified as we approach closely the beginning of the fight ; but there is abundant evidence tending to show that these cries were made before the killing, and near enough to it to explain the purpose and reflect upon the attitude of the white party at the moment of the attack.

It is also claimed by counsel for the state that the deceased, when these cries were made, had not yet joined the mob, and that there was no evidence of a conspiracy between him and the balance of the white party, or even between the members of the white party, to injure or wrong the colored men. It is probably true that when the first set of cries were made the deceased had not joined the crowd, but did so about the time the last set were uttered, for it seems entirely clear that he, with some ten or fifteen more men, rushed out of Manning's saloon and joined it just before the conflict began. The claim that there was no evidence of a common purpose among the white crowd to wrong the colored men is not supported by the bill of exceptions. The evidence that there was such a purpose can be gathered from almost every page of it. The colored men went into Manning's saloon where the deceased at the time was ; they remained a moment, then went out and were at once followed by the deceased and ten or fifteen others (nearly all of whom were in the saloon), and he was one of those who, it is claimed, circled round and hemmed in the colored men a moment before the fight began. It may be he was merely an innocent spectator, but the circumstances justify the inference that he had grasped the purpose of the crowd, and joined in its execution. But whether he had or not, it can

not affect this question of the admissibility of the cries of the mob. The colored men could not be required to single out and separate friend from foe. The claim of the plaintiff in error was that he and his fellows saw behind and around them a mass of men fifteen to twenty times their number, apparently hostile; and he had a right to show to the jury the desperate nature of the situation as it appeared to him and them, and in this view of the question it is wholly immaterial whether or not the deceased had joined in the alleged purposes of the mob, or was there merely as an innocent spectator, for his presence, as well as that of every other innocent spectator, swelled the numbers of the white party that was menacing the colored men.

The colored men from their stand point had a right to treat the white party as a unit; to show to the jury its origin, its purposes and its appearance; how can this be done but by proof of the acts and declarations of its members? The cries of a mob have been admitted in evidence from an early period of our law, whenever it was material to show its purposes and temper; indeed they are in the nature of verbal acts, accompanying and explaining the movements of the mass, and have little or no analogy to mere uncommunicated threats of an individual, with which counsel for the state insist they should be classed. In this case they were made so short a time before the attack which plaintiff in error claims was made on the colored party, by the mob, that they reflect in a most important manner upon the attitude of the white party at the moment the attack was made, and upon that ground were also admissible. The nature of the transaction required the fullest investigation of every circumstance that led to the creation of the white party, and by which its existence and progress can be traced to its culmination. We think the rejection of this evidence was error.

6. Counsel for plaintiff in error prepared and presented to the court certain special instructions, which he requested to be given to the jury; the court declined to give any of them, and proceeded to charge the jury. To this refusal of the court to charge the special instructions requested, to certain specified

parts of the charge, and to the charge as a whole the plaintiff in error excepted.

The first proposition of the first request reads that before the jury can consider the acts and declarations of co-conspirators, made out of the presence of the defendant on trial, it must appear, "That there was formed by the parties a combination or conspiracy for the purpose of the committing of the crime charged or some unlawful act of similar kind." \* \* \* This proposition states the law too favorably for the plaintiff in error. The authorities are conclusive that the conspiracy is sufficiently shown when it is made to appear that the common purpose was to commit an unlawful act quite dissimilar from the crime in fact committed, if the latter crime was one that might have been contemplated, reasonably, as likely to result from the attempt to commit the act intended; and some respectable authorities go yet further, and hold the conspirators responsible for an accidental homicide of a co-conspirator when committed while he is engaged in advancing the common unlawful purpose. 4 American & English Encyclopedia of Law, 619, and authorities cited. But the first proposition is sufficient to justify the court in refusing this request.

The second proposition requested was not, in view of the evidence, of sufficient importance to make its rejection error.

7. The third and fourth propositions requested by the plaintiff in error, and refused by the court, are as follows:

*Third request*—"It is not sufficient to establish the guilt of defendant Goins of aiding and abetting Harrison in the commission of the homicide charged in the indictment, that he was present on the scene with others where the alleged killing was done, for he may have been present not knowing that any crime was about to be committed; and if he was not there in furtherance of an understanding or common purpose to commit some unlawful act, and was in company with Harrison without knowledge that Harrison or any of his co-defendants contemplated the commission of an offense, he is not responsible for the acts of Harrison or his other co-defendants, if he,

Goins did not participate in the commission of the offense charged."

*Fourth request*—"Again, if the only purpose made known to Goins prior to the killing of Hughes, and the only one contemplated or entered upon by him, was a defense of himself and his companions from an attack by a party of men superior in numbers and strength which had been threatened, and neither the defendant nor his comrades were to be aggressors, or attack the opposing party, then such common purpose of defense merely was not unlawful and criminal."

The two preceding propositions are closely related to each other and will be considered together. Had no evidence been given by the defense, but instead the case submitted to the jury on the evidence of the state alone, yet that evidence was fairly susceptible to a construction that made those two propositions applicable. When from that evidence we consider the great numerical superiority of the white crowd, the conduct of the colored men, and the circumstances of the attack, together with the absence of any testimony showing any ill will on the part of the colored men towards the deceased, or any other individual of the white crowd, unless towards Casey with whom Crowder had quarreled early in the evening, and that there was no evidence of a purpose to harm him, we at once see strong grounds for Goins to contend that the purpose of himself and his comrades, in the light of that evidence alone, was none other than that assumed in those propositions. Therefore those propositions were pertinent and should have been given to the jury. And the jury on that evidence alone, aided by pertinent instructions, might well have found a verdict in favor of plaintiff in error. When, however, we consider the evidence for the defense, the necessity is at once apparent, that these propositions, or similar ones, with even greater elaborations, should have been given to the jury to enable them to determine the issue intelligently by applying correct and pertinent legal propositions to the evidence before them. This evidence sufficiently appears in another part of this opinion and will not be repeated here. The court erred in refusing to charge these two propositions,

and, upon a careful examination of the whole charges, we find no substitute for them.

8. *Fifth request*—"And further, if the defendant, Goins, and his co-defendants were in the exercise of their lawful rights in passing along the streets at the time of the conflict wherein Hughes was killed, and neither of the accused parties began the affray or attack, then the defendant and those accused with him had the right to repel the assault with such force as was necessary to do so, and had a right to defend themselves from danger to life or great bodily harm; and if they were suddenly assailed or surrounded by superior numbers, armed with weapons dangerous to life, or calculated to do great bodily harm, the defendants had a right to stand on their defense, to repel force by force even to the taking of life, if they believed, and had reasonable grounds to believe, that it was necessary to do so to prevent either death or great bodily harm to themselves, and if necessary they may use such weapons as will accomplish the purpose."

This proposition ought to have gone to the jury; it was applicable to the evidence given in behalf of plaintiff in error. That evidence tended to prove that the plaintiff in error and his comrades were passing along the street in a lawful manner; that they were pursued by a mob which outnumbered them more than twenty times; that the mob overtook, surrounded and attacked them with stones in a most violent and savage manner, and that what they did was in their lawful defense against this violence. The evidence in the case called for a full and careful statement of the principles of the law of self-defense, yet only six or eight lines of a long and elaborate charge were directly devoted thereto, and they were followed by a statement considerably longer and much more explicit, limiting and qualifying the right. Subsequently, directions were given to the jury with a view to aid them in applying the law of self-defense, as it had before been laid down to them, to the evidence in the case; but we think these directions were not as full and explicit as the evidence and the circumstances of the case required. However, had they been sufficiently full and explicit in this respect, yet they were pre-

---

Goins v. The State.

---

faced by a statement that substantially deprived plaintiff in error of their benefit. This statement required the jury to find that the plaintiff in error and his comrades "were without fault and in the peace of the state" before they would be clothed with the right of self-defense. Ordinarily this language might have been a harmless rounding up of a sentence, but when we see that evidence had been given from which the jury might have found that at least one of these colored men was drunk, one or more of the others slightly in liquor, that their conduct was regarded as insolent and offensive, that they had been ordered to go home by a peace officer, they may have well supposed that colored men so conducting themselves were not free from fault and not in the peace of the state, and therefore not clothed with the right of self-defense. The jury should have been made to understand that it was not the province of the white crowd to prescribe and regulate the conduct and demeanor of colored men, though one or more of them may have been drunk and insolent, or all displayed a spirit of offensive bravado; that notwithstanding such conduct, the colored men while in the exercise of their lawful right to pass and repass along the streets of the town, were still clothed by law with the right to defend themselves from the malicious and violent attack of a numerous mob. We have carefully read the evidence, and can only account for the verdict in this case upon the ground that the jury misconceived the law in this or some other respect.

In this connection, and in the light of the evidence, we think the following portion of the instructions given to the jury was prejudicial to the plaintiff in error. "That the Irish boys, white people, or whoever they may have been, who are claimed to have been connected in the conflict in which Patrick Hughes was killed, as the antagonists of the prisoner and those with him, or in any controversies prior to that time, are not now upon trial, nor are their acts, sayings, or doings, however wicked or criminal, under investigation in this case, with a view to determine the extent of the guilt of such parties." It is true the "Irish boys" were not upon trial in the sense that the jury could convict them, but they formed a

party hostile to the colored men, and the more violent, malicious and criminal their conduct was made to appear, the more complete was the justification of the colored men. It was, as appears by the bill of exceptions, the central purpose of counsel for plaintiff in error, to exhibit to the jury the conduct of the white crowd in its most offensive and criminal aspect. The great mass of his evidence had been directed to that sole end. The justification of the means used by the colored men to repel the attack, depended to a great extent upon its violent and savage character, and any admonition to the jury tending to divert their attention from this feature of the case, could not be otherwise than highly prejudicial to the defense.

9. The 6th request was as follows: "If you (the jury) find from the evidence, that Frederick Harrison, named as principal in the indictment, did take the life of Patrick Hughes, but did it in a sudden quarrel, or in the heat of passion, his offense would be but manslaughter; and if you further find that the defendant William Goins, did no overt act, and took no active part in the killing, but was merely present when the quarrel arose, or fight began, you cannot in such case find him guilty as an aider and abettor of Harrison." In view of the evidence this charge should have been given. No doubt there may be such a crime as aiding and abetting manslaughter. This court has so held, 10 Ohio St. 459, but each case must stand upon its own circumstances, and in the case at bar there was no evidence that the plaintiff in error said a word or did an act, at the time the fight began or was in progress, that could be construed as aiding or abetting Harrison in taking the life of the deceased; so that if that act of Harrison was the result of a sudden quarrel, or done in the heat of passion, instead of being done pursuant to a prior conspiracy the plaintiff in error had no criminal connection with it, and was entitled to have the jury charged accordingly, and the refusal was error.

10. Misconduct of the jury is alleged, and the affidavits of the jurors offered to prove it; from which it appears that the jury at first stood six for assault and battery, and as a com-

promise the six agreed to vote for manslaughter, and the vote then stood six for manslaughter and six for murder in the second degree; that it was then agreed to prepare twenty-four ballots, twelve for manslaughter and twelve for murder in the second degree, place all of them in a hat and each juror draw one ballot therefrom, and render a verdict either for manslaughter or murder in the second degree, as the majority should appear; that the first drawing was a tie, but the second one resulted in eight ballots for murder in the second degree and four for manslaughter, and thereupon, according to the agreement, a verdict was rendered for murder in the second degree. There was no other evidence of this misconduct than the affidavits of the two jurors; for, while an affidavit of the prisoner was offered in corroboration of them, it is apparent on its face that his statement was only hearsay, and for that reason properly rejected. There only remained in proof of the alleged misconduct the two affidavits of the two jurors; this was ample proof in the absence of evidence to contradict them, if the evidence was competent at all. The court held them not competent, which consequently left the allegation of misconduct without proof. The almost unbroken current of authority supports this holding (*Kent v. State*, 42 Ohio St. 426; *Thompson and Merrium on Juries*, 539), and thus it may appear to all the world, by the subsequent statements of the jurors, that the liberty of a citizen has been gambled away in a jury room, yet the court is powerless to interfere, because the policy of the law is, first, to seclude the jury, and second, not to allow their evidence to impeach their verdict.

As a general rule, no doubt, this doctrine is founded on the soundest principles of public policy, otherwise the rendition of a verdict, in nearly every jury trial, would become merely the beginning of a new controversy over the mode of its rendition, endangering the stability of verdicts and the security of judgments rendered thereon; and the time and attention of courts would be wasted in investigating alleged misconduct of jurors, frequently of the most frivolous character. But a case like this at bar strains the principle to its utmost tension, and suggests a doubt whether there may not be found a carefully



---

Myers v. The State.

---

guarded exception to a rule, the universal application of which may present a spectacle so discreditable to our jury system.

It may be said there is a remedy afforded in the power of the court to grant new trials on the ground that the verdict is not supported by, or is contrary to, the manifest weight of the evidence. This is no doubt true to some extent, but its inefficiency is apparent to all who are familiar with the rules of law and the practice of courts on the subject of new trials, and is especially exemplified by the case at bar.

We do not care, however, to press the question further; its determination is not necessary to a decision of the case, but, being one of the questions presented by the record, we give it this passing notice.

*Judgment reversed.*

---

MYERS v. THE STATE.

*Contempt of court—What is—Sec. 5639, Rev. Stats. construed—Proceedings in contempt reviewable on error.*

1. The furnishing by a correspondent for publication, and procuring to be published in a newspaper, an article containing statements regarding a judge then engaged in the trial of a cause, imputing to him conduct in respect to the case upon trial, which, if true, would render him an unfit person to preside at the trial of the cause, with knowledge on the part of the correspondent that such newspaper has a large circulation in the county where the trial is in progress, and with reasonable ground to believe that the same will, when published, be circulated in the court room and about the court-house during said trial, and there read, and which was, afterward, during the trial, circulated and read therein, is a contempt of court.
2. Such act comes within the purview of section 5639, Revised Statutes which provides that, "A court, or judge at chambers, may punish, summarily, a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice," and may be punished summarily, and such punishment is within the discretion of the court trying the case.
3. A proceeding to punish for contempt under said section, including the question whether or not the court, in awarding punishment, has exercised a reasonable discretion, may be reviewed upon error.

---

Myers v. The State.

---

4. The fact that the presiding judge is the subject of libel in the article which forms the basis of the contempt proceeding, does not render him incompetent to try the complaint.
5. Upon such trial it is competent for such judge to take judicial notice of pertinent facts connected with the transaction which come within the cognizance of his own senses.
6. It is not competent for him to take judicial notice of, and consider in his deliberations, that the respondent had been guilty of another contempt of the same court, for which he had theretofore been tried and found guilty. And where it appears that the consideration of such facts may have influenced the exercise of discretion, in fixing the penalty, to the prejudice of the respondent, the proceeding will be reversed for such error.

(Decided May 21, 1889.)

**ERROR to the Court of Common Pleas of Franklin County.**

The plaintiff in error was tried at the April term, 1888, of the Court of Common Pleas of Franklin County, upon a charge of contempt, which offense consisted in the writing of a certain article, and causing it to be published in a daily newspaper published in the city of Cincinnati. At the time of the writing and publishing, there was upon trial in said court, a criminal indictment found at a previous term, against one Montgomery, upon a charge of changing and altering the tally sheet of precinct A, thirteenth ward, of the city of Columbus, just after the state election of the year 1885. The plaintiff in error was jointly indicted with Montgomery, and the case was still pending against him. The article charged, among other things, in substance, that the grand jury which found the indictment referred to—the one upon which Montgomery was then being tried—was called by the judge of said court then presiding, “for a special partisan purpose,” and “never honestly drawn from the box”; that the presiding judge, co-operating with the clerk and prosecutor, had packed the grand jury, and that the writer had, in this manner, been indicted “by rascally and infamous methods.”

The newspaper had an extended circulation throughout the state, including the county of Franklin, and was freely circulated, sold and read about the court house and in the court room, all which was known to the plaintiff in error at the time

of the writing and publishing. The article was, in fact, read on the day of its publication, by many persons in the court room, was much talked about within the bar of the court, and in the presence and hearing of the court.

A written information was presented by counsel specially appointed by the court for that purpose, alleging against the plaintiff in error, the writing and publishing of the article in question, charging that the same was done by him to vilify, degrade and defame the court and its officers, including the grand jury, and to bring the court and its officers into contempt, and to obstruct the administration of justice in the cause upon trial, and that said acts were a contempt of court. An answer was filed by the respondent, which denied the jurisdiction of the court of the subject matter and of his person; denied any intention to commit a contempt or to obstruct the administration of justice; alleged that the article was written by the respondent, who was and had been for years a correspondent of the newspaper, as an answer and comment upon a communication which shortly before had appeared in another newspaper also published in Cincinnati; that the article was written upon facts and information which had come to his knowledge, which he believed to be true; that the article was read, before its publication, to a member of the bar of Hamilton county, of high standing, who gave the opinion that the publication of it would not be a contempt of court, which was concurred in by another lawyer of experience, and that the article was written under the influence of feelings engendered by his personal knowledge of the fact that a grievous and irreparable wrong was being done him in connection with the prosecution of the case referred to.

A trial was had at which evidence was introduced by both parties. The court also took judicial notice of many matters, some of which are quoted in the opinion. The respondent was found guilty, and sentenced to pay a fine of two hundred dollars and costs, be imprisoned ninety days in the county jail, and stand committed until the fine and costs should be paid.

*R. A. Harrison, E. L. Taylor and T. E. Powell*, for plaintiff in error:

1. The court below had no power to issue the attachment against the defendant below and sentence him to be punished by fine and imprisonment.

1. On the 2nd of March, 1831, congress passed "An act declaratory of the law concerning contempt of court." (4 U. S. Statutes at Large, 587). This act was enacted shortly after the trial of the district judge of the United States for the state of Missouri, on an impeachment preferred against him in the United States Senate, for issuing an attachment against a member of the bar, for making a publication in relation to a suit which had been decided by the judge. In 1834, the legislature of Ohio passed an act with the same title, by which the provisions of the act of congress were made applicable to the several courts of this state. (1 S. & C. Stat. 258). The provisions of this act are still in force. (Rev. Stat. secs. 5639, 5640).

This act defines and limits the jurisdiction of the courts of this state to issue attachments for contempt of court. It is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment.

The question is, then, whether, under this act, the court below had jurisdiction to arrest and inflict summary punishment upon the plaintiff in error for writing an article in the city of Cincinnati, and causing its publication in a newspaper printed and published in that city, concerning the conduct of the judge in a case which was on trial in said court in the city of Columbus.

2. The history of this act, the time of its passage, its title and provisions, must be considered together, in order to ascertain its meaning and construction. These show that it was intended to be a prohibition of the exercise of summary jurisdiction over contempts, excepting only such as the first section of the act defines and provides may be punished summarily.

3. When it was enacted, the act of congress had received that construction by the federal courts. (*Ex parte Poulson*,

Hazzard's Reg., vol. 15, p. 380). When an act of congress is adopted in the legislation of one of the United States, its settled contemporaneous construction is deemed to accompany and form part of it. (See *Cathart v. Robinson*, 5 Pet. 264 ; *McDonald v. Hovey*, 110 U. S. 619).

4. As the act defines and limits the extent to which the courts of this state can exercise jurisdiction over contempts, and the manner in which it shall be exercised, the question is, *not* whether authority exists in the courts of this state to punish contempt of court summarily, but the inquiry is, what is the extent of the power, and the mode in which it may be exercised, under the act.

5. Arbitrary power is repugnant to the nature of our institutions. There are certain vital principles in our government which prevent the exercise of such power by any department, excepting to the limited extent absolutely demanded by imperious public necessity. Implied reservations of personal rights arise from the essential nature of all free governments, without which the political compact could not exist. The power to punish summarily, being derived from necessity, the law of necessity fixes its bounds. The necessity is limited to the preservation of order and decorum in court, and the enforcement of the mandates and decrees of the court. (See 2 Bishop's Crim. Law, sec. 243).

6. In this state, it is the legislature, not the court, which has the power to define a crime and ordain its punishment. Contempt of court is a specific criminal offense, punished sometimes by indictment, and sometimes in a summary proceeding. In either mode of trial the adjudication against the offender is a conviction of a crime. (*Passmore Williamson's Case*, 26 Penn.St. 18) ; and the imposition of a fine for a contempt is a judgment in a criminal case. (*New Orleans v. Steamship Co.*, 20 Wallace, 387, 392). It follows that the legislature may define and limit the power to punish *public or criminal* contempts. If the authority of the legislature upon the subject be not unlimited, surely it must be conceded that it exists to the extent of providing that the power to punish by imprisonment and fine, in a summary manner, without the

---

Myers v. The State.

---

intervention of a jury, shall be exercised only when necessary : (1) to insure order and decorum in the presence of the courts ; (2) to secure faithfulness on the part of their officers, and (3) to enforce obedience to their lawful orders, judgments and process ; and that when a contempt is committed out of court, as the writing or publication of articles reflecting on the conduct of the judge, other legal remedies shall be pursued to redress the wrong. It is universally held that the jurisdiction of *inferior* courts of record, is limited to contempts committed in court. (*The Queen v. Lefroy*, L. R. 8, Q. B. 134). By the common law of England, libels on courts of superior jurisdiction were held to be contempts ; but this did not apply to courts of inferior jurisdiction. But in England the power in such superior courts to punish for *constructive* contempt, originated in a *fiction*, and was for a purpose that has no analogy in our government. In the superior courts at Westminster, which represent the one superior court of the land, this power was coeval with the original constitution, and has always been exercised by them. These courts were originally carved out of the one supreme court, and are all divisions of the *aula regis*, where it is said the king in person, dispensed justice, and the power of committing for contempt was an emanation of the royal authority, for any contempt of court is a contempt of the king. The theory of the British government requiring royalty to be invested with an imaginary perfection, is diametrically opposed to the principles of our popular government ; so that here, the power has not even a fiction for its support. (See *Storey v. People*, 79 Ill., 45).

7. Said acts are founded upon the conviction, justified by experience, that it is unsafe to vest the power to punish, in a summary manner, contempts which consist of publications in newspapers, and the like ; and that the exercise of arbitrary power, when imperious public necessity does not require it, is destructive of the legitimate object of its exercise, for the reason that nothing destroys authority so much as the exercise of power pressed too far, especially when the officer exercising it is, from the nature of the subject-matter of the proceeding and his relation thereto, under strong temptation to

unduly strain or exercise his power. One of the maxims of the law is, a judge cannot punish a wrong done to himself. (12 Coke, 114). Another is, no one can be judge in his own case. (12 Coke, 13). No *class of men* can be safely entrusted with *irresponsible* power; so it is dangerous to entrust any *class of officers* with arbitrary power, especially in cases where they have a direct personal interest or feeling. In such cases precise limitations are needed; and the congress and the legislature, deeming any shred or remnant of *undefined* common law power to punish, dangerous, prohibited it; and in doing so have, in effect, enacted that no court of this state shall have power to fine and imprison for contempt of court when that contempt is committed out of court, as the writing or publication of articles reflecting on the conduct of the judge. The legislature provided other remedies for such proceedings. Such legislation has been sustained in New York and Pennsylvania. *People v. Court of Oyer and Terminer*, 101 N. Y. 245; *Foster v. Commonwealth*, 8 W. & S. 79. In the latter case, Chief Justice Gibson remarked: "The end in view was to abolish the obnoxious process of attachment for contempt, in all but a few specified cases; not to narrow a libeler's liability to punishment, by interdicting any procedure which allows him the benefit of trial by jury."

8. Inasmuch as the courts of common pleas of this state derive their actual existence and jurisdiction from the general assembly, it follows that their power to punish contempts in a summary manner is under its control, and it may deprive the courts of the state of authority to punish in that manner outdoor publications, of any character. The legislature has abrogated the English common law distinction as to the power to punish contempts, between the superior and other courts of record. The fact that such power has nowhere been deemed necessary in inferior courts of record, shows that it is not necessary in superior courts, and but for the fiction that any contempt of such courts is contempt of the king, the distinction would never have had an existence at common law. Business cannot be conducted in any court unless the court can suppress disturbances, and the only means of doing that is by

immediate punishment; and, therefore, the legislature expressly empower the courts, whether of superior or inferior jurisdiction, to inflict summary punishment for such contempts.

9. As the tribunal to punish contempt in a summary manner will be the tribunal whose authority has been contemned, the power is necessarily limited, and the legislature may prescribe the mode of its exercise.

10. The fundamental fallacy upon which the proceeding in the court below is founded, is the postulate, that the courts of common pleas of this state have the inherent and absolute power to inflict summary punishment upon any person guilty of conduct of such a nature as by the common law of England is punishable as a contempt. This fallacy is based on the assumption that the undefined English common law power of courts of superior jurisdiction to punish as contempt, whatever such courts may adjudge to be contempt of their authority, vested absolutely in the several courts of common pleas of Ohio the moment the general assembly invested them with jurisdiction; and that, therefore, it was not competent for the general assembly, either when it provided for their organization or afterward, to fix any limitation upon, nor to define, the undefined common law power of the superior courts of England to punish contempts, nor to regulate the mode of the exercise of such power.

Although power to punish contempt may have vested in the courts of common pleas upon their organization, it was, nevertheless, competent for the general assembly, under the authority expressly conferred upon it by the constitution (Art. IV, sec. 4), to "fix by law the jurisdiction of the courts of common pleas, and the judges thereof," to define their jurisdiction to punish for contempt and to prescribe the mode of its exercise.

Courts of common pleas derive no jurisdiction from the constitution. Their entire jurisdiction is conferred upon them by the legislature. In this respect, the federal courts inferior to the supreme court and the courts of common pleas stand upon the same footing. The former derive their powers from the congress, and the latter derive theirs from



the general assembly. The Supreme Court of the U. S. in *Ex parte Robinson*, (*supra*), held said act "declaratory of the law of contempt," to be valid. And this court has enforced the act of the legislature which was copied from the act of congress. *Baldwin v. The State*; *Lowe v. The State*, (*supra*). In *Stevens v. The State*, 3 Ohio St. 453, it was held, that the constitution confers no jurisdiction whatever upon the court of common pleas, in either civil or criminal cases; that it is made capable of receiving jurisdiction in all such cases, but can exercise none until conferred by law; and that the jurisdiction of the court of common pleas in any county may, after it has been conferred by law, be taken away by the general assembly and vested in another court created by law. The constitution ordains that there shall be courts whose name shall be courts of common pleas, but that these courts shall have such jurisdiction as may be conferred by law. It would, therefore, be absurd to say that the general assembly simply because the constitution gives a name for a court, but whose jurisdiction is to be fixed by law, can not define and limit the power of such court to punish contempt in a summary manner, whereas it has authority to define and limit the power of other courts created and named by it, and whose jurisdiction in any county may be the same as that vested by law in the court of common pleas.

11. The power to punish, summarily, for contempt of court, is, in its nature, an exception to the provisions of the constitution. It is a power to deprive a man of his liberty, without a jury and without a regular trial. It can not, therefore, be extended, in the least degree, beyond the limits which have been imposed by the statute. No implication, and no fancied necessity, can be permitted to add to the literal meaning of the words by which the legislature restricted this power. *Lowe v. The State*, 9 Ohio St. 337; *Baldwin v. The State*, 11 Ohio St. 681; *Rutherford v. Holmes*, 5 Hun. 317; *Bachelder v. Moore*, 42 Cal. 412.

12. The phrase "misbehavior of any person or persons, in the presence of the said courts," signifies, within the mean-

ing of the statute, misbehavior by any person or persons who are in the room or place where and when the court is engaged in the transaction of business. If the legislature had not intended to use the phrase in that sense, the clause immediately following, viz.: "or so near thereto as to obstruct the administration of justice," would not have been inserted; for, if the word "presence" had been understood in any other sense than *actual* presence, that being its natural and ordinary signification, the latter clause would have been entirely superfluous. It is clear that the phrase "in the presence of the court," was used in the sense of the technical expression, *in facie curiæ*; and contempts "in the face of the court" consist of wilful disturbances in the actual presence of the court. (4 Black. Com. 285). The first section of the act in terms *excludes constructive presence*, and provides for the punishment of direct contempts in the face of the court, or so near thereto as to obstruct the business of the court.

13. The phrase "or so near thereto as to obstruct the administration of justice," was designed to provide for the summary punishment of any person guilty of disorderly behavior so near the court room, when the court is in actual session, as to interrupt the business of the court.

*Baldwin v. The State*, and *Lowe v. The State*, (before cited); *The State v. Goff*, Wright's R. 78; *The State v. Colter*, Id., 481; *Ex parte Robinson*, 19 Wallace, 505; Judge Curtiss' Lectures on the Jurisdiction of Federal Courts, p. 181; *Terry*, *Ex parte*, 128 U. S. 289.

14. If the plain language of the first section of the act had not placed its meaning and effect beyond the reach of a quibble, the provisions of the second section as to the punishment of all other acts of contempt of court by indictment and a trial by jury, would have dispelled any doubt which might have been suggested. "The obstruction of the administration of justice," which the first section provides may be punished summarily, includes any such misbehavior "in, or so near to the court," while sitting, as interrupts the transaction of its business; whereas "the obstructing or impeding the administration of justice or the endeavor so to do," which the second

---

Myers v. The State.

---

section provides shall be punished upon indictment found, embraces some act of corruption, or some force, or some threat, by which it is done, but which does not disturb the order and decorum of the court. These are not disturbed by the publication of an article in a newspaper libeling the conduct of the judge in a cause, whether the same be pending or not at the time of the publication, and whether the judge, or a bystander in court, read the same to himself or not.

15. The record shows that many of the facts upon which the court founded its sentence were supposed to be of such a nature that the court could take "judicial notice" of them. In acting upon this supposition the court erred. (Bliss on Code Pleading, secs. 177 to 199, inclusive, and cases there cited).

*J. T. Holmes*, for defendant in error.

The article was a gross libel, and no word of regret on account of the writing or publication thereof has escaped the respondent or his counsel.

It was written and published pending the tally sheet trial after careful deliberation by its author. The fundamental doctrine of causation and liability applies. 1 Bishop's Crim. L. sec. 641.

No pleadings are necessary in such a proceeding. Rev. Stats. secs. 5639, 5640; *Steube v. The State*, 3 C. C. Rep. 383.

It is claimed that the publication did not affect or interfere with the administration of justice. No one can measure, or weigh, or know, its effect on the administration of justice.

*We know the jury disagreed.* *Reg. v. Wilkinson*, 41 Up. Can. Q. B. 42.

Under the statute, no allegation of such interference is requisite. Misbehavior in the presence of the court completes the offense.

Sec. 5639 is not as good English as the act of 1834, S. & C. 258, or as the Federal Act of March 2, 1831.

These are *constitutional* courts, bringing into being with them *inherent power* to punish such a contempt summarily.

The general assembly did not create them and cannot,

---

Myers v. The State.

---

therefore, destroy or limit their right of self-defense, their power of self-protection, in this respect. *State v. Morrill*, 16 Ark 384, *Dandridge case*, 2 Va. Cas. 409; *Bayard v. Passmore*, 3 Yates (Pa.) 438; *Rex v. Clement*, 4 B. & A. 233; *Tenny's case*, 23 N. H. 166; *Oswald's case*, 1 Dall. 343; *State v. Matthews*, 37 N. H. 450; *Cossart v. State*, 14 Ark 539; Hawes' Jurisdiction of Courts, sec 8; *Chandler v. Nash*, 5 Mich 409; *Rowe v. Rowe*, 58 Mich. 353; *Streeter v. Patton*, 7 Mich 341; *State v. Frew & Hart*, 24 W. Va 416; *Arnold v. Com.*, 80 Ky. 300; *Little v. State*, 90 Ind. 338; *People v. Wilson*, 64 Ill. 195; *Ex parte Robinson*, 19 Wall. 513; *State v. Woodfin*, 5 Ind. 199; *Neel v. State*, 9 Ark. 259; *Ex parte Adams*, 25 Miss. 893; Bishop's Stat. Cr., sec. 137, 1st Ed; 1 Thomp. on Tr., secs. 125-128; *Holman v. State*, (Ind.) 5 N. E. Rep. 557; *Cheadle v. State*, 110 Ind. 301; Mr. Wirt in *Peck's case*, 497, 500-501; *Cartwright's case*, 114 Mass. 230; *Sturoc's case*, 48 N. H. 428; *Darby's case*, 3 Wheeler's Cr., Cas. 1; *Tyler's case*, 64 Cal. 434; *Harwell v. State*, 10 Lea 544; *Storey v. People*, 79 Ill. 47; Stimson's Am. Stat. L. sec. 582; *Watt v. Lightwood*, 2 R. H. L. 361; *Middlebrook v. State*, 43 Conn. 257; *Cheeseman case*, 46 N. J. L. 137; *State v. Myers*, 19 Law Bulletin, 302-315.

That the power to punish summarily may be hastily or arbitrarily exercised is not an argument to disprove its existence or the necessity of its being lodged in the courts. *Ex parte Terry*, 128 U. S. 289-314; *Bradley v. Fisher*, 13 Wall. 350; Mr. Wirt in *Peck's case*, 497; *Cheeseman case*, 46 N. J. L. 137; *Reg. v. Wilkinson*, 41 Up. Can. Q. B. 42.

The ordained and necessary instrumentalities of courts are under the same protection. 4 Bl. 126

The offense of respondent was in the presence of the court and was designed to obstruct the administration of justice.

See cases and authorities *supra*; also, Harston's Code, secs. 1211, 1212; *Sinnott v. State*, 2 Lea 281; *State v. Doty*, 32 N. J. L. 403; *Com. v. Feely*, 2 Va. Cas. 1; *Hollingsworth v. Duane*, Wall. 77-102; *Bronson's case*, 12 Johns. 460; *U. S. v. Patterson*, 26 Fed. Rep. 509; *U. S. v. Carter*, 3 Cr. C. C. 423; *Onslow v. Whalley*, 12 Cox's Cr. Cas. 358; *Skipworth v. De*

---

Myers v. The State.

---

*Castro*, Id. 371; *Johnson's case*, 20 Q. B. 68; *U. S. v. Emerson*, 4 Cr. C. C. 188; *State v. Garland*, 25 La. Ann. 533; *Rez v. Wigley*, 32 E. C. L. 415; *Davis v. Sharon*, 1 Cr. C. C. 287; *U. S. v. Schofield*, Id. 130; *Blight v. Fisher*, Pet. C. C. 41; *Bridges v. Sheldon*, 7 Fed. Rep. 19; *Stewart's case*, 3 Scam. 395; 2 Bishop's Cr. L. sec. 259, 7th Ed.

Corrupt approach to a juror, or similar act, though many miles from the court house, would be punishable summarily under section 5639 or not at all, as a contempt.

It is argued that the offense is punishable criminally and to punish as for contempt, would violate the maxim "*nemo bis vexari*." This is in the face of all authority. To claim that an assault and battery of a judge while holding court can be punished by indictment *only* is to shock the universal sense of decency and order in the administration of justice.

1 Bishop's Cr. L. sec. 1067, 7th Ed; *Reg. v. Martin*, 5 Cox's Cr. Cas. 356; *Cartwright's case*, *supra*.

*Baldwin v. State*, 11 Ohio St. 681, is not fully reported and the files show that the *charge made* was not under the section of the statute now in question.

Summary punishment for contempt, is not an infringement of the state constitution which guarantees to the citizen trial by jury.

Wall. C. C. 77; 32 N. J. L. 403; 4 Paige, 397; 23 Minn. 411; 7 Biss. C. C. 329; 12 Iowa, 208; 37 N. H. 450; 4 Eng. 259; 128 U. S. 289; Cooley on Const. Prov. 390, n. 3; 13 Neb. 446; 24 Tex. 12; 4 Ark. 257.

A mere disclaimer of all intention of contempt does not purge the contempt or relieve the party from the consequences of the act committed by him. *Watson v. Savings Bank*, 5 S. C. 189; *Wartman v. Wartman*, Taney's C. C. 362; *State v. Garland*, 25 La. Ann. 532; *People v. Freer*, 1 Caine's Rep. 518; *In re Wooley*, 2 Ky. 95; *Terry's case*, 36 Fed. Rep. 419; Rapalje on Contempts, secs. 49 and 121 and notes. See 9 Fed. Rep. 316; 64 Ill. 195; 24 W. Va. 467; *Henry v. Ellis*, 49 Iowa.

The court properly took judicial notice of what occurred under the presiding judge's five senses, pending the tally sheet

trial and the proceeding before him, resulting in the punishment of respondent as a witness therein. There is no rule of law requiring an abjuration of such knowledge under the circumstances.

The power to punish such contempt summarily *inheres* in the court, coming into existence at the same moment, and is not conferred on the court, nor can it be taken away, by the general assembly.

It is not a part of *jurisdiction*, technically speaking, under the constitution.

In this view the *Steven's case*, 3 Ohio St. 453, cuts no figure.

It is contended in behalf of plaintiff in error, that he was entitled by way of defense, to show the truth of his scandalous charges, and 10 Ohio St. 548 and 3 Johns. Cas. 337, are cited to sustain the proposition. Neither case even leans that way, and the line of authority the other way is unbroken.

For the first time in the history of this cause, counsel in argument move to our ground. "The statutory enactments on the subject have not changed the law;" in other words, they are "*declaratory* of the law concerning contempts."

The power in question is sanctioned by immemorial law.

Counsel say "jurisdiction is power and power is jurisdiction. They are one and the same thing as applied to the courts." Again, it is said the "courts derive all their powers from the act of the general assembly."

These positions are untenable.

The general assembly does not derive its power to punish contempt from its *own act* but the power inheres in the body under the constitution. So, with courts established by the organic law. Where the general assembly has power to create a court it may, if not restrained by the constitution, destroy such court's power to defend itself and leave it an object of contempt, but not otherwise. 7 Ohio St. 333.

*J. H. Collins*, for defendant in error.

I. At common law the publication made by plaintiff in error, is a contempt, clear and unquestioned. *In the matter of*

## Myers v. The State.

*Sturte*, 48 N. H. 428 ; *Respublica v. Oswald*, 1 Am. Dec. 246 ; *Respublica v. Passmore*, 2 Am. Dec. 388, and note ; *State ex rel. De Buys v. Judges Civil District Court*, 32 La. Am. 1261 ; *Cooley on Torts*, 424 ; *People v. Wilson*, 64 Ill. 221 ; *Hollingsworth v. Duane*, Wall. C. C. 77 ; *Bronson's case*, 12 Johns. 460 ; *State v. Morrill*, 16 Ark. 384 ; *Stuart v. People*, 3 Scam. 405 ; 2 Bishop's Crim. Law, § 259 ; *In re Cheltenham, etc., R'y*, L. R. 8 Eq. 580 ; *Daw v. Eley*, L. R. 7 Eq. 49 ; *Littler v. Thomson*, 2 Beav. 129 ; *In re Crawford*, 13 Am. Jur. 955 ; *Regina v. Ounslaw*, L. R. 9 Q. B. 219 ; s. c., Cox C. C. 358 ; 5 Eng. Rep. 443 ; *Regina v. Skipwith*, L. R. 9 Q. B. 219 ; s. c., 5 Eng. Rep. 456 ; *Regina v. O'Dougherty*, 5 Cox C. C. 348 ; Anonymous, 2 Atk. 469 ; *State v. Freiv*, 24 W. Va. 416 ; *Matter of Moore*, 63 N. C. 397 ; *Tenny's case*, 23 N. H. 162 ; *Stovey v. People*, 79 Ill. 45 ; *Ex parte Van Hook*, 3 City Hall Rec. 54 ; *Ex parte Spooner*, 5 Id. 109 ; *Dunham v. State*, 6 Ia. 245 ; *Ex parte Hickey*, 4 Smedes & M. 751 ; *People v. Freer*, 1 Caines, 484 ; *Henry v. Ellis*, 49 Iowa, 205 ; *Morrison v. Moat*, 4 Edw. Chan. 25.

II. Even with the strict and limited construction claimed for section 5639, Revised Statutes, the information makes a case thereunder.

Misbehavior, according to Bouvier, is "improper or unlawful conduct." The attorneys for the plaintiff in error not only concede that his conduct was improper and unlawful, but they go beyond this and assert that it was criminal, and so infamous that he cannot be punished therefor, except upon the presentment of a grand jury.

But was it "in the presence of or so near the court or judge as to obstruct the administration of justice"?

If the act did, in fact, obstruct the administration of justice, it would seem to follow logically, that he was near enough to the court to perform the act. But it is insisted that he was in Cincinnati, and what he did was done there, and that, therefore, he was not near enough to come within the provisions of the statute. In the case of *Robbins v. State*, 8 Ohio St. 157, it is held, that if the prisoners delivered poison to his victim in Shelby county, to be taken by her in Marion county, and

---

Myers v. The State.

---

that she there swallowed it; or if it had been sent to her there by the prisoner for the purpose of being given to her; and if she, having received it from him, should swallow it, by which death ensued, in either case the defendant would be guilty of administering poison in Marion county. Suppose Myers, being in Cincinnati, had, by any means whatever, sent or procured dynamite or other destructive agencies, to have been so used in the court house in Franklin county, as to destroy life, it would not be pretended that he might not be charged with being present in the county of Franklin and in the court house, and so using the destructive articles as to commit murder, although in point of fact he was not personally present, but was in Cincinnati.

In the present case Allen Olds Myers was a defendant in a criminal prosecution; was jointly indicted with one Robert B. Montgomery; a separate trial had been granted, and Mr. Montgomery was being tried, and while so being tried the article here charged was written by Mr. Myers in the city of Cincinnati; was printed in the Cincinnati *Enquirer* with the full knowledge on the part of Myers that it would be read by thousands of persons in the city of Columbus, and by scores in the court house and court room, during this trial; and its purpose was to prejudice the public and the officers of the court against the judge presiding at that trial, and for the purpose of influencing the action of the court by unduly over-awing and scandalizing it.

If, in the cases suggested, it would have been perfectly proper and legal to have charged Allen Olds Myers with being present and administering poison, although personally in Cincinnati, what reason can be suggested against the application of the same rule to the case at bar? It was an attempt on the part of Myers to poison the mind of the public, and it was his intention to destroy the moral influence of the court by exploding in the court room the publication referred to.

That an attempt to degrade the court and thus destroy its power and influence amounts to an obstruction of the administration of justice, is fully sustained by the authorities already



---

Myers v. The State.

---

cited, and in the light of these authorities can not even be questioned.

III. A liberal construction should be given to statutes which declare and limit punishable causes for contempt. *State v. Galloway and Rhea*, 5 Caldwell, 326.

IV. The courts have inherent power to punish contempts, outside of any and all legislative authority. *Little v. State*, 90 Ind. 338; *Underwood v. Duffee*, 15 Mich. 361; *Chandler v. Nash*, 5 Mich. 409; *Shoultz v. McPheeters*, 79 Ind. 373; *United States v. Hudson*, 7 Cranch, 32; *Sanders v. State*, 85 Ind. 318; *Cavanaugh v. Smith*, 84 Ind. 380; *Nealis v. Dicks*, 72 Ind. 374; *Neel v. State*, 9 Ark. 259; *Clark v. People*, Breese, 340; *Ex parte Smith*, 28 Ind. 47; *Brown v. Brown*, 4 Ind. 627; *State v. Mathews*, 37 N. H. 450; *Com. v. Dandridge*, 2 Vir. cases, 408; *Ex parte Biggs*, 64 N. C. 202; *Cartwright case*, 114 Mass. 238; 4 Blk. Com. 284-288; Acta Canc. 200, 264, 321, 373, 642, 753, 755; *The King v. Almon*, Wilmot, 243, 254; Clarke's Praxis, tit. 62; Mass. Col. Laws (ed. 1672), 36; Anc. Chart. (o.); *Thwing v. Dennie*, Quincy, 338; 6 Dane Ab. 528; *Folger v. Hoogland*, 5 Johns. 235; *Ex parte Kearney*, 7 Wheat. 38; *Durant v. Supervisors*, 1 Woolworth, 377; *Winslow v. Nayson*, 113 Mass. 411; *McDermott v. Clary*, 107 Mass. 501; *Rex v. Ossulston*, 2 Stra. 1107; S. C. Nom.; *The King v. Pierson*, Andr. 310; *Spalding v. People*, 7 Hill, 301; S. C., 10 Paige, 284; 4 Howard, 21; *State v. Woodfire*, 5 Ired. 199; *State v. Williams*, 2 Speers, 26.

BY THE COURT. The article was a libel upon the presiding judge, but that alone did not form the basis of the information. The intention of the publication was to insult and intimidate the judge, degrade the court, destroy its power and influence, and thus to bring it into contempt; to inflame the prejudices of the people against it; to lead them to believe that the trial then being conducted was a farce and an outrage, which had its foundation in fraud and wrong on the part of the judge and other officers of the court, and, if communicated to the jury, to prejudice their minds, and thus prevent a fair and impartial trial. Besides, the tendency was, when

read by the judge, to produce irritation, and, to a greater or less extent, render him less capable of exercising a clear and impartial judgment. It therefore tended directly to obstruct the administration of justice in reference to the case on trial, and its publication was a contempt of court. The fact that, before its publication, a professional opinion was given that the publication would not be a contempt, does not change the essential character of the defamatory article, nor relieve the respondent of responsibility for its origin and dissemination. Neither was he justified in resorting to such means to right any real or imaginary wrong to himself in respect to the finding of the indictment. A plea in abatement would have searched the record and caused the indictment to be set aside, if found by an illegal body, or procured by improper means.

The publication came within sec. 5639, Rev. Stats., which reads: "A court, or judge at chambers, may punish summarily, a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." It is true that the article was not written, nor was it circulated by the respondent, in the presence of the court. Indeed, it was written in the city of Cincinnati, though dated at Columbus. But the publication was in the court room, as well as elsewhere. It was intended to have effect, and did have effect, in the court house at Columbus, and the writer was just as much responsible for that effect as though he had in the court room itself, and while the trial was progressing, circulated and read aloud the article, or uttered the libelous words verbally. The acts were thus done, if not in the very presence of the court, at least so near thereto as to obstruct its business. For violation of the foregoing section of the statute the punishment is within the discretion of the court. Section 5645, which provides for the punishment by fine of not more than five hundred dollars, and imprisonment for not more than ten days, applies to offenses covered by section 5640, but not to the preceding one above quoted. The discretion here given is a sound, reasonable discretion, and its exercise in a case of this kind is reviewable. It, therefore, becomes unimportant to consider the question much argued, viz:

whether or not the legislature may interfere with the inherent power of courts to punish for contempt. And, as the court had power to try summarily, the form of the complaint is not a material question.

Though the libel was, in large part, against the presiding judge, that fact did not disqualify him from trying the proceeding in contempt. It was not the libel against the judge which constituted the offense for which the respondent was liable as for a contempt of court. The offense consisted in the tendency of his acts to prevent a fair trial of the cause then pending in the court. It is this offense which constitutes the contempt, and for which he could be punished summarily; and the fact that in committing this offense, he also libeled the judge, and may be proceeded against by indictment therefor, is no reason why he may not and should not be punished for the offense against the administration of justice.

The statute clearly authorizes, as did the common law, courts to punish summarily, as contempts, acts calculated to obstruct their business. They could not be maintained without such power, nor could litigants obtain a fair consideration of their causes in a court where the jury or judge should be subject, during the trial, to influences in respect to the case upon trial, calculated to impair their capacity to act impartially between the parties. Nor is there serious danger to the citizen in its exercise. Power must be lodged somewhere, and that it is possible to abuse it is no argument against its proper exercise. But we think the danger more imaginary than real. The judgments of all inferior courts are subject to review. We have an untrammelled press, which, in legitimate ways, may properly exert a powerful influence upon public opinion. All judges are liable to impeachment for any misdemeanor in office. Our entire judiciary is elective, and all courts are thus easily within the reach of the people. These checks can, we think, be relied upon to prove an adequate protection to the citizen against any arbitrary or unreasonable use of the discretion thus given to the courts.

In considering and disposing of the case the court took judicial notice, without knowledge on the part of the respondent that it would be done, of many matters, among them the following :

"That said respondent left the city of Columbus for his home in Cincinnati, Ohio, on or about the 29th day of February, 1888, under his promise to counsel for the state in the said trial, then pending, to return as a witness upon a telegram at any time one might be sent him ; that he received such telegraphic notice and answered it on the 5th day of March, 1888, that he would attend as such witness on the following day ; that instead of so attending, he purposely went beyond the limits of the state of Ohio to evade the service of process of any kind from this court upon him, and so remained until the end of the trial aforesaid ; that said respondent attended said trial and drew his pay as a witness for said defendant from said 24th day of January, 1888, until the first day of March, 1888, and then absented himself without leave and in violation of the order of the court, until said trial ended, and has since, to-wit: on the 7th day of April, 1888, been tried and adjudged by this court in contempt and fined for such absence and has paid such fine and costs."

It was competent for the court to take judicial notice of pertinent facts connected with the transaction which came within the cognizance of his own senses. But when the court assumed to take judicial notice of the facts which formed the ground of a previous proceeding for contempt against respondent, and of his being adjudged guilty, we think, the court erred. If the facts were competent to be taken into consideration, which is, at least, very questionable, they were the subject of evidence, and could not be judicially noticed. Proof of a previous like offense is not competent evidence save in a small class of cases where guilty knowledge is a necessary element to be shown by the state, and such proof was not necessary in this case. Beyond this, the proceeding there noticed could have been heard before any other judge of the court, and had it been, the impropriety of taking judicial notice of what was proven, and of the result, would be apparent to every

Rouse, Trustee v. The Merchants' National Bank of Cincinnati.

one; and it is none the less so from the fact that the proceeding may have been heard by the judge who tried the case in review. The consideration of this incompetent matter was calculated to have a potent influence in determining the sentence imposed. In a case where the penalty is limited by statute, and the sentence is the lowest allowed by law, and where, upon the whole record, the punishment seems justified, a reviewing court might not feel it a duty to disturb the judgment for an error of the character referred to. But in a case where the penalty is discretionary, and it appears, as in this case, upon the whole record that the punishment is severe, and the court cannot say that the incompetent matter did not affect the degree of punishment inflicted, we feel compelled to reverse the judgment and remand the cause for further proceedings.

*Judgment accordingly.*

### ROUSE, TRUSTEE v. MERCHANTS' NATIONAL BANK.

*Corporations—When cannot create valid preferences—Assignments by.*

A corporation for profit, organized under the laws of this state, after it has become insolvent, and ceased to prosecute the objects for which it was created, cannot, by giving some of its creditors mortgages on the corporate property to secure antecedent debts without other consideration, create valid preferences in their behalf over the other creditors, or over a general assignment thereafter made for the benefit of creditors.

(Decided June 18, 1889.)

The T. J. Nottingham Manufacturing and Supply Company, a corporation organized under the laws of this state, and located in Cincinnati, being unable to meet its liabilities, on the 25th day of June, 1884, made an assignment to F. W. Browne for the benefit of its creditors. The assignment was duly filed in the probate court, and thereafter, Browne was removed, and George L. Rouse appointed trustee to administer the assignment. The Merchant's National Bank of Cin-

46s	493
46s	510
46s	493
47	539
46	493
64	213
46	493
768	720

---

Rouse, Trustee v. The Merchants' National Bank of Cincinnati.

---

cincinnati, claiming to be a creditor of the corporation, and that the debt due it was secured by a chattel mortgage upon the property assigned, presented its claim to the trustee for allowance, and the same having been rejected by him the original action was brought by the bank in the Superior Court of Cincinnati, to compel the trustee to allow the claim in the settlement of the trust, and to establish the priority of the mortgage lien. The petition of the bank alleges that the corporation, being indebted to it in the sum of six thousand dollars on six promissory notes particularly described, on the 25th day of June, 1884, " by a resolution of its board of directors duly passed, authorized T. J. Nottingham, its president, to execute and deliver to this plaintiff a chattel mortgage upon all its property on the premises occupied by it at the south-east corner of Plum and Pearl streets, in the city of Cincinnati, O., and thereupon a chattel mortgage was regularly drawn and executed conveying said property to the plaintiff to secure the payment of the six promissory notes as hereinbefore set forth. And said T. J. Nottingham, in executing said chattel mortgage, signed the name of said company by him as its president, after the schedule of the property conveyed by said mortgage, but not in the place where such signing is usually done; but said execution and signature was made at said place for the sole purpose of authenticating the execution of said instrument. A copy of which mortgage is herewith filed and made a part hereof. Plaintiff further states that it, through its officers, made the affidavit on said mortgage required by the statutes of Ohio, as to the amount due thereon, and that said claim was just, and said chattel mortgage was thereupon filed in the recorder's office of Hamilton county, Ohio, as required by law, on the said 25th day of June, 1884, at 2:28 p. m. Plaintiff further says that the said T. J. Nottingham Manufacturing and Supply Company, after the execution and delivery of said chattel mortgage, conveyed the property described therein to one F. W. Browne, in trust for its creditors, and by order of the probate court of Hamilton county the defendant was afterwards appointed trustee for said creditors in the place of said Browne, and said Rouse took posses-

sion of said property as such trustee, and has converted a large part of it into money, and has now in his hands therefrom sufficient to pay the sum due this plaintiff; and plaintiff says that its claim, duly verified according to law, has been presented to said Rouse, and payment thereof refused, and the said claim, both upon the said notes and mortgage, rejected. Plaintiff therefore asks a judgment against the said George L. Rouse for the allowance of said plaintiff's claim, and that the said mortgage was validly executed, and is valid, and for the sum of \$6,000 and interest, and for costs."

The trustee answered, denying the indebtedness of the corporation to the bank and the due execution of the chattel mortgage, and alleging that the notes described in the chattel mortgage were given by T. J. Nottingham to the plaintiff to raise money for his own individual use; that the plaintiff knew that fact when the loans were made to him, and that the endorsement which he gave of the company upon the notes, was without any authority whatever, as the plaintiff well knew.

The answer further avers that the board of directors of the company had no authority to order a chattel mortgage to be given to the plaintiff to secure the individual debt of T. J. Nottingham; that the chattel mortgage was attempted to be executed with several other chattel mortgages, for the purpose of giving the bank and others a preference over general creditors, and was procured from the board of directors, and the order for the same was procured; by said T. J. Nottingham, who well knew that the debt due the bank was his own individual debt, which he was thus attempting to have the the company prefer out of its assets over its own general creditors; that an assignment for the general benefit of creditors, under the insolvent laws of Ohio, was duly executed, and delivered to F. W. Browne as assignee at the same time, and before the mortgage set up in the petition was attempted to be executed by the said T. J. Nottingham; that the assignment was duly delivered to said Browne by the company for the general benefit of creditors; that the mortgage was never delivered to the bank, but after its attempted or pretended ex-

ecution, was delivered in an unfinished condition to the said F. W. Browne, the assignee, who caused it to be filed in the recorder's office in Hamilton county, and a few minutes thereafter caused the deed of assignment, which was then in his hands, to be filed in the probate court of Hamilton county; and the defendant alleges that said chattel mortgage is void and in fraud of the rights of the general creditors.

The case was heard upon the pleadings and evidence, and then reserved to the general term for decision, where, at the request of counsel, the court stated its findings of fact and conclusions of law separately as follows:

"That on the 23d day of June, 1884, the T. J. Nottingham Manufacturing and Supply Company, defendant, being insolvent, resolved to make a general assignment of its property for the benefit of its creditors, and resolved to give a mortgage on the same property to the plaintiff, and other mortgages to other creditors, which mortgages should have preference over the assignment, and appointed F. W. Browne assignee.

"The deed of assignment was executed and delivered to the said F. W. Browne, who drew all the instruments and acted as attorney for the company in the whole matter as well as assignee, on the 24th of June. Before the execution of the assignment, the mortgage was drawn, but a blank was left therein for the insertion of the amount secured by it. Next day, the 25th of June, the mortgage was completed and executed, and immediately thereafter the other mortgages were completed and executed, the whole being done at one sitting.

"The property was described in the body of the mortgage as 'the goods and chattels described in the schedule hereunto annexed,' and was signed, not at the close of the body of the mortgage, but at the end of the schedule, and the signature was there affixed for the purpose of authenticating and executing the mortgage. A copy of the mortgage is hereto annexed and made part of this finding; and, upon request of the defendant, it is further found that the other mortgages executed were signed both at the close of the body of the mortgage and at the close of the schedule. On the 25th of June, the completed mortgage was filed in the recorder's office of Hamilton county,



where chattel mortgages executed in Cincinnati by residents thereof are required by law to be filed, and on the same day, an hour or two later, the assignment was filed with the judge of the probate court.

"The amount due the plaintiff on the first day of this term, secured by said mortgage, is \$6,542.41; F. W. Browne, assignee, was removed, and George L. Rouse, defendant, was appointed trustee in his place. The property has been sold, and the proceeds are in the hands of said trustee. The plaintiff presented his claim to said trustee, and demanded its allowance and payment, all of which the said trustee refused.

"As conclusion of law the court finds that the mortgage is a valid instrument, and has preference over the assignment, and the plaintiff is entitled to the payment thereof from the proceeds of the mortgaged property.

"To all of which findings the defendant then and there excepted, and thereupon the defendant made and filed a motion to set aside the said findings, and for a new trial, which motion was by the court overruled, to which action of the court the defendant then and there excepted.

"It is therefore considered by the court that the plaintiff recover from the said trustee, from the said proceeds in his hands, \$6,542.41, with interest at six per cent. per annum from the first day of February, 1886, and that the costs of this action be paid from said proceeds, and that this judgment be certified to the probate court."

The present proceeding in error is prosecuted here, to reverse the foregoing judgment of the superior court.

*Lincoln, Stephens & Lincoln*, for plaintiff in error.

We claim that an insolvent corporation, which has quit its business, cannot make a valid preference. The capital stock and property of an insolvent corporation is held to be a trust fund, pledged to the payment of the debts of the corporation, and that its creditors become the beneficiaries thereunder. *Morawitz on Corporations*, 1 Ed., sec. 575; *Field on Corporations*, sec. 365; 2 *Waterman on Corporations*, sec. 208;

Rouse, Trustee v. The Merchants' National Bank of Cincinnati.

*Bank of Pittsburgh v. Mfg. Co.*, 19 Law Bull. 254; *Wood v. Dummer*, 3 Mason, 308; Morawitz on Corporations, sec. 581; *Robins v. Embry*, 1 S. & M. Ch. Rep. 263; Wait on Insolvent Corporations, secs. 162, 654.

*Watson, Burr & Livesay* and *Albery & Albery*, also for plaintiff in error.

*John W. Herron*, for defendant in error.

The individual liability of the stockholders of an insolvent corporation, constitute a trust fund for the creditors. So far, this court has already decided; but it has never applied the same character to the general assets. Insolvent corporations have given mortgages and sold their property without the consent of its creditors. If such assets are a trust fund for the creditors, no one, with knowledge of the insolvency of a corporation, could buy such assets, or deal with the officers of the corporation in reference to them. *Whitwell v. Warner et al.*, 20 Vt. 444; *Savings Bank v. Bates*, 8 Conn. 505; *Callin v. Eagle Bank*, 6 Conn. 233; *Ringo v. Trustees*, 13 Ark. 563; *Wilkinson v. Bauerle*, 41 N. J. Ch. 635; *Vail v. Jamison*, 41 N. J. Ch. 648; *Bridge Co. v. Douglas*, 12 Bush 73; Morawitz on Corporations, sec. 582.

WILLIAMS, J. The general question for decision in this case, is, whether a corporation for profit, organized under the laws of this state, can, in the disposition of the corporate property, after it has become insolvent, and ceased to further prosecute the objects for which it was created, prefer some of its creditors over others.

The claim of the plaintiff in error is, that when the corporation becomes insolvent and ceases to carry on business, its property and assets constitute a trust fund for the benefit of its creditors, and the directors in possession of the corporate property, being trustees for all the creditors, cannot lawfully dispose of it otherwise than for the equal benefit of all the corporate creditors. The defendant in error, on the other hand contends, that when not restricted by the law of their creation, or prevented by the operation of some bankrupt or in-

solvent law, insolvent corporations may, the same as natural persons, make preferences among their creditors.

Decisions of courts will be found, maintaining each of these diverse positions. The precise question has not been decided in this state, and in view of the conflict of authority elsewhere, we are at liberty to adopt that rule, which best harmonizes with the policy and legislation of the state, rests upon the sounder reason, as we conceive it to be, and coincides with our sense of justice and right.

The right of the individual debtor to prefer one creditor to another, though at the time insolvent, rests upon his complete dominion over, and consequent unrestricted power of disposition of his property. And the cases which hold that insolvent corporations are entitled to make preferences among their creditors, attribute to them, the same unlimited control over their property that is possessed by individuals over theirs. In *Catlin v. Eagle Bank of New Haven*, 6 Conn. 233, which is the leading case in this country maintaining the right of an insolvent corporation to prefer one or more of its creditors over others, the decision is distinctly placed upon the ground that the particular corporation was invested with the control, and power to dispose of the corporate property, as fully and to the same extent that natural persons have with respect to their property. Hosmer, C. J., in the opinion in that case, says: "If the corporation, so far as regards its right to manage and dispose of its property, has power analagous with that which is vested in an individual, the plaintiff's bill is wholly destitute of merits. \* \* \* The cases of an individual and of a corporation in the matter under discussion, it appears to me, are not merely analagous, but identical; and I discern no reason for the slightest difference between them." And again he says that "no express trust was created on the happening of the bank's insolvency; but the charter, on every fair principle of construction, conferred on the corporation the entire control of its property, as *well after, as before this event*. \* \* \* "The insolvent banking corporation is just as much a trustee of the creditors, and no more, as the insolvent individual is the trustee of his creditors. The relation of creditor and

---

Rouse, Trustee v. The Merchants' National Bank of Cincinnati.

---

debtor exists in both cases; but from this relation no trust arises."

We have not the charter of the corporation in question in that case before us, but we assume that the learned judge was correct in saying that by every fair construction, it conferred upon the corporation the entire control of its property after its insolvency; if so, no fault need be found with his conclusion, that it might, like any individual, prefer some of its creditors over others.

Corporations generally do not possess such amplified powers, and especially, those created under the laws of this state. In this state, corporations have not the same powers and capacities as natural persons, but are authorized for specified and defined purposes. They are clothed with those attributes only, with which the law, under which they are created, invests them, and can exercise no powers, not expressly conferred, or necessary to carry into effect those in terms granted.

Since the constitution of 1851, it has been the settled policy of this state, to afford adequate protection to the creditors of corporations. That constitution contains the provision that "dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." Legislation, under this constitution, has been shaped to fully effectuate the constitutional guarantee. All corporations organized for profit, are required to have a capital stock, fifty per cent. of which must be subscribed, and at least ten per cent. paid in, before the organization can be effected; and the stockholders are made liable, in addition to their stock, to an amount equal to the stock held by them, to secure the payment of the debts of the corporation. This liability, it has uniformly been held by this court, is a security exclusively for the benefit of the creditors of the corporation, over which the corporation has no control; and, moreover, the security is for the equal benefit of

all the creditors. The suit to enforce it must be by all the creditors, and against all the stockholders; and no creditor can acquire priority over the others, with respect to it. And, while power is conferred on corporations to reduce their capital stock, it is expressly provided that the rights of creditors shall not be affected, nor in any way impaired. The corporate powers, business and property of the corporation, must be exercised, conducted and controlled by a board of directors, all of whom must be stockholders; and, as a still further guarantee for creditors, the powers of corporations over their property, its use and disposition, are so circumscribed by positive statute that no corporation can employ its stock, means, assets or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its creation. The extent of the powers expressly conferred on them are, to sue and be sued, contract and be contracted with, and acquire and convey such real and personal estate as may be necessary or convenient to carry into effect the objects of the incorporation, to make and use a common seal, and do all needful acts to carry into effect the objects for which they are created. It is obvious, that the corporate property, can not with propriety be said to be owned by the corporation, in the sense of ownership as applied to property belonging to natural persons. The latter may without restriction, acquire and dispose of property for any lawful purpose, while both the power of acquisition and disposition of the former, are limited to the special objects already mentioned. The corporate property is in reality a fund set apart to be used only in the attainment of the objects for which the corporation was created, and it can not lawfully be diverted to any other purpose. As soon as acquired, it becomes impressed with the character of a trust fund for that purpose, and the shareholder or creditor may interpose to prevent its diversion from the objects of the incorporation, injurious to him. Taylor on Private Corporations, sec. 34.

The custody and control of the property, and the management of the business of the corporation, are confided to a board of directors chosen by the shareholders. Into the hands of

---

Rouse, Trustee v. The Merchants' National Bank of Cincinnati.

---

these officers, through whom alone corporations can act, the shareholders surrender their funds, and entrust the management of the affairs and property of the corporation to them. A relation of trust and confidence, therefore, arises between the stockholders and directors of a corporation, out of which grow the duties of the latter, to so administer the trust as will best promote the interests of the former, to pay them their appropriate dividends from time to time, and upon the termination of the corporation, to distribute to them their respective shares of the corporate property, after the payment of its debts and liabilities. These duties are eminently of a fiduciary nature. It is now so well established as to be no longer a subject of controversy, that the relation of trustee and *cestui que trust* subsists between the directors and shareholders. And, since the directors, as such trustees, represent and act for all the shareholders, they cannot lawfully favor any particular shareholder or class of shareholders; but every authority and power possessed by them, must be exercised for the benefit of all alike. Otherwise, no corporation could endure. If the directors and officers of a corporation were allowed, in the conduct of the business, and disposition of the property, to favor one or more shareholders to the detriment of the others, the minority would be the prey of the majority; for, it would then be within the power of the majority to combine and elect the officers, who in turn should manage the whole business and apply the whole corporate property for the benefit of the majority, and thus practically confiscate the entire property interest of the minority. Corporations would thus become traps for the unwary, and legalized instruments of fraud. The doctrine that the directors are trustees for the shareholders, and for the equal benefit of all, it is obvious, is essential to the existence of corporations.

But, it is the right of the creditors, equally with the shareholders, to have the corporate property applied to the purposes for which the corporation was created, and this includes the payment of the corporate indebtedness contracted in the prosecution of its business. The rights of the creditors to the

corporate property, so far as it is necessary to meet their demands, are superior to those of stockholders.

In *Perry on Trusts*, sec. 242, the relative rights of the creditors and shareholders are thus defined: "A corporation holds its property in trust, *first* to pay its creditors, and *second* to distribute to its stockholders *pro rata*. If therefore a corporation should dissolve, and divide its property among its shareholders without first paying its debts, equity would enforce the claims of its creditors by converting all persons, except *bona fide* purchasers for value, to whom the property had come, into trustees, and would compel them to account for the property and contribute to the payment of the debts of the corporation to the extent of its property in their hands."

It is now firmly established, that the property and assets of a corporation are a trust fund for the payment of its debts, especially in case of its insolvency. Since the case of *Wood v. Dummer*, 3 Mason, 311, where Mr. Justice Story is said to have first formulated the doctrine, it has been generally accepted, and is sustained by the highest authority. Mr. Justice Swayne announces it with great clearness, in *Sanger v. Upton*, 91 U. S. 56, 60, as follows: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liabilities which subsists in private co-partnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration, and without notice. It is publicly pledged to those who deal with the corporation, for their security." In *Curran v. State of Arkansas*, 15 How. 312, Mr. Justice Curtis said on this subject: "The capital and debts of banking and other moneyed corporations, constitute a trust fund and pledge for the payment of its creditors and stockholders, and a court of equity will lay hold of the fund, and see that it be duly collected and

---

Rouse, Trustee v. The Merchants' National Bank of Cincinnati.

---

applied." And in *Upton, assignee v. Tribilcock*, 91 U. S. 45, 47, Mr. Justice Hunt thus lays down the doctrine: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and can not be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts." The doctrine is sustained by many authorities: 2 Story's Eq. sec. 1252; Pomeroy's Eq., sec. 1046; Taylor on Private Corp., sec. 654, 655; *Haywood v. The Lincoln Lumber Co.*, 64 Wis. 639. It was held by this court, as early as *Taylor v. Miami Exporting Co.*, 5 Ohio, 165, where the opinion of Mr. Justice Story in *Wood v. Dummer, supra*, is quoted with approbation, and it is more distinctly announced in the later case of *Gooden v. The Canal Co.*, 18 Ohio St. 182, where it is said to be "well settled that the property of a corporation is a trust fund in the hands of its directors, for the benefit of its creditors and stockholders."

It being established that the corporate property is a trust fund for the benefit of the corporate creditors, it follows, that after the insolvency of the corporation is ascertained, and the objects of its creation are no longer pursued, the managing board of directors then having the custody of the property, become trustees thereof for the creditors; and this relation, necessarily forbids any discrimination between the beneficiaries, in the distribution or application of the fund. The due execution of the trust, demands absolute impartiality toward the *cestui que trustent*. They must be treated alike, and no preference can be made among them, without a direct violation of the duties arising from the relation. It would seem clear, that, if the corporate property constitutes a fund for the creditors, it is as much so for one creditor as for another, and that the directors in possession, are without authority to dispose of it in disregard of the rights of any creditor. They can no more discriminate between creditors in such case, than they could, before the insolvency of the cor-



poration, between the shareholders. The objects for which the corporation was created being no longer prosecuted, and the occasion, for the exercise by the board of directors, of the power of control and disposition of the property for such purpose having ceased, there remains no purpose to which its assets can lawfully be devoted, except to the payment of the debts. In equity the corporate property becomes the property of the creditors, and their equities are equal. Every creditor, who became such by parting with his money, property or other thing of value to the corporation, contributed to the accomplishment of its purposes, and augmented its corporate fund; and when the fund is no longer demanded for the purposes of the corporation, the rights of the creditors become fixed instantly and equally; for each, having contributed to the common fund, has an interest in it, in proportion to his claim, equally with every other creditor. This interest is sometimes called the equitable lien of the creditor on the corporate property, which enables him to follow it, even after it has left the hands of the directors, wherever it can be found, except in the possession of *bona fide* purchasers for value, and subject it to the payment of the corporate indebtedness. It would seem to result as a necessary consequence, that insolvent corporations which have ceased to carry on business, can not, by pledge or mortgage of the corporate property to some of the creditors, in payment or security of antecedent debts, without other consideration, create valid preferences in their favor over others; and this is the view maintained by the more recent writers on the subject.

In the last edition of Taylor on Private Corporations, it is said: "When corporations become insolvent, the duty of the directors toward its creditors becomes even stricter and more imperative; for, under such circumstances, the rights of creditors are paramount, and it has become probable that they will be somewhat damaged; and the plain duty of directors who control the funds from which corporate debts are paid, is to see that the loss is as small as possible. Moreover, since, upon the insolvency of the corporation, the rights of unsecured creditors are equal, it would seem to be unlawful, even in the ab-

---

Rouse, Trustee v. The Merchants' National Bank of Cincinnati.

---

sence of a statute expressly forbidding it, for directors to make preferences among them." (Sec. 759). And, in sec. 668, it is further said: "To allow an insolvent corporation to make an assignment of its property, giving preferences to a portion of its creditors over the others, is unjust, as well as utterly repugnant to the doctrine that corporate property is a trust fund, on the credit of which persons contract with the corporation. If such property constitutes such a fund, it is clearly held in trust for the benefit of one creditor just as much as another, and to prefer one creditor to another is evidently beyond the authority of the trustee. This view is far from being unsupported by direct authority."

Mr. Morawitz, in his excellent work on private corporations, referring to the cases which hold that corporate preferences are valid, says:

"This doctrine, in the opinion of the writer, is wholly indefensible on principle. The capital provided for the security of the creditors of a corporation is a fund held for the benefit of all the creditors equally. That the unsecured creditors of a corporation are entitled to an equal distribution of the common security, has often been recognized by the courts of equity in adjusting the rights of creditors among themselves, and in relation to the company's shareholders. After a corporation has become insolvent, and has ceased to carry on business, the rights of its creditors become fixed. If a corporation, whose assets are not sufficient to satisfy all of its creditors in full, can prefer certain creditors, leaving others unpaid, this must be by virtue of a power reserved by implication to the company and its agents. But this power can not justly be included in the general powers of management which a corporation must necessarily possess over its property, in order to carry on its business and further the purposes for which the company was formed. The purposes of a corporation are not furthered in any manner, by giving it or its agents the power, after the company has become insolvent and has ceased to carry on business, and after its shareholders have lost their interests in the corporate estate, to prefer a portion of the creditors, according to interest

or mere whim, and to pay their claims in full, leaving the others wholly without redress. The doctrine that an insolvent corporation may prefer certain creditors at the expense of others, seems to have been first started in *Catlin v. Eagle Bank*, (6 Conn. 233), a case in which the fundamental rule that the assets of an insolvent corporation constitute a trust fund pledged for the security of creditors was denied. It is a doctrine which is at variance with the whole theory of the law concerning the rights of creditors of insolvent corporations, and is contrary to the plainest principles of justice." (2 Morawitz, Corporations, sec. 803).

And in a very recent work on insolvent corporations it is said: "The practical working of the rule sustaining corporate preferences is monstrous. The unpreferred creditors have only a myth or shadow left to which resort can be had for payment of their claims; a soulless, fictitious, unsubstantial entity that can be neither seen nor found. The capital and assets of the corporation, the creditors' trust fund, may, under this rule, be carved out and apportioned among a chosen few, usually the family connections or immediate friends of the officers making the preference. This rule of law is entitled to take precedence among the many reckless absurdities to be met with in cases affecting corporations, as being a manifest travesty upon natural justice." (Wait on Insolv. Corporations, § 162). "Elsewhere we have deprecated the right which is recognized in a number of cases, of insolvent corporations to make preferential assignments. It would seem to be an idle waste of words to designate the capital and assets of a corporation as a trust fund for the benefit and security of creditors in the event of dissolution or insolvency, if one of the first principles of the law of trusts—equality of distribution—could be openly violated, and the effects of the bankrupt company apportioned among a favored few." (Ib., § 654).

Without extending the discussion, we are of opinion that when a corporation for profit, organized under the laws of this state, becomes insolvent and ceases to carry on its business or further pursue the purposes of its creation, the corporate property constitutes a trust fund for the equal benefit of the cor-

---

Rouse, Trustee v. The Merchants' National Bank of Cincinnati.

---

porate creditors, in proportion to the amounts of their respective claims; and that it cannot then, by pledge or mortgage of the property to some of its creditors as security for antecedent debts, without other consideration, create valid preferences in their behalf, over the other creditors, or over an assignment thereafter made for the benefit of creditors.

Instead of the individual liability of the stockholders being a ground of objection to this conclusion, it furnishes an additional reason in its support. It is well settled that the corporate property is the primary fund for the payment of the debts of the corporation, and the statutory liability of the stockholder is a security to be resorted to only when the payment of its debts can not be enforced against its property; and it was held in *Harpold v. Stobart*, decided at this term,\* that stockholders who have assigned their stock to an insolvent assignee, are liable only for such portion of the debts existing while they were such stockholders, as is equal to the proportion which their stock bears to the stock held by all stockholders liable for the same debts. Admit the power of the board of directors of an insolvent corporation to make preferences among its creditors, and it must follow that they may prefer any they choose to select for that purpose. This would be wholly inconsistent with the trust relation subsisting between the directors and shareholders, for since different stockholders, or classes of stockholders may be liable for different debts, and not all for the same debts, if the directors could apply the corporate property to some of its debts leaving others entirely unprovided for, they would be at liberty to select the debts for which particular stockholders alone were liable, and appropriate all of the property to their satisfaction, leaving the other stockholders to respond to the full extent of their statutory liability, for the remaining debts. The directors would in this way, be enabled to apply the whole corporate property to their own exoneration.

Whether an insolvent corporation, which is still a going concern, and in good faith engaged in the prosecution of its

---

\* *Ante*, page 397.

business, may borrow money, or contract, or procure an extension of other *bona fide* indebtedness, and convey or pledge the corporate property in security thereof, is a question not involved in this case, and upon which we here express no opinion.

It appears from the finding of facts in this case, that the directors of the corporation declared its insolvency, and directed by the same resolution, the execution of an assignment for the benefit of its creditors, and of the preferential mortgages to the bank, and other creditors. It does not appear, that there had been any agreement between the mortgagees and the corporation that such mortgages should be given, nor, that they were given for any other consideration than the antecedent indebtedness of the corporation to the creditors receiving them. Being merely voluntary mortgages to secure pre-existing debts, without other consideration, they can not prevail against the equitable rights of the corporate creditors. *Lewis v. Anderson*, 20 Ohio St. 281.

Counsel have argued at length, and with great ability, another question sufficiently raised on the record, and that is, whether, in view of the facts found by the court below that the execution of the assignment for the benefit of creditors, and the preferential mortgages, was directed by the same resolution, and were in fact executed at the same time, the several instruments may not be treated as constituting together an assignment in trust, with intent to prefer the mortgagees, and so inure to the equal benefit of all creditors. The determination of this question not being necessary to the decision of the case, no opinion is expressed upon it.

Other questions presented in the argument, and considered by the court, do not call for further report.

No serious objection is made here to so much of the judgment of the court below as establishes the amount of the plaintiff's claim, and requires the assignee to allow the same in the administration of his trust, and to that extent the judgment is affirmed. But the judgment establishing the validity of the mortgage, and giving it priority over the assignment,

---

Sayler, Assignee *et al.* v. Simpson *et al.*—The State *ex rel.* v. Root, Aud'r.

---

is reversed, and judgment will be entered upon that branch of the case for the trustee.

*Judgment accordingly.*

---

SAYLER, ASSIGNEE, AND W. & F. LIVINGSTONE ET AL. v.  
SIMPSON ET AL.

ERROR to the Circuit Court of Hamilton County.

*Sayler & Sayler*, for Sayler, assignee.

*Bateman & Harper*, and *Kittridge & Wilby*, for W. & F. Livingstone and Munson Brothers.

*Thomas McDougal* and *Avery & Holmes*, for defendants in error.

This case presents the same question that is decided in the preceding one of *Rouse v. The Bank*, and was heard with it. Following that decision, the judgments of the circuit court and court of common pleas are reversed and cause remanded for further proceedings.

---

THE STATE EX REL. ENSIGN v. ROOT, AUD'R.

*Sheriff's fees for venire for jury*—Section 1230, *Rev. Stats.*, construed.

(Decided June 18, 1889.)

ERROR to the Circuit Court of Lorain County.

*P. H. Boynton*, for plaintiff in error.

*E. G. Johnson*, for defendant in error.

BY THE COURT. Section 1230, *Rev. Stats.* (77 Ohio L. 116), relating to compensation to sheriffs, which provides that they shall receive for "serving and returning venire for petit or grand jury, traveling fees included, to be paid by the county,

---

Julian v. The State.

---

four dollars and fifty cents; or summoning a jury, to be allowed on each issue, including traveling fees, forty cents; summoning a special jury, including traveling fees, four dollars and fifty cents," authorizes payment by the county of four dollars and fifty cents to the sheriff for the service and return of each venire for a regular petit jury, or a grand jury, or a special jury, but does not authorize payment by the county for the service and return of a special venire for jurors to fill up the panel.

*Judgment affirmed.*

---

JULIAN v. THE STATE.

*Juries—Drawing of—Section 5167, Rev. Stats., construed.*

(Decided June 18, 1889.)

MOTION for leave to file petition in error to the Court of Common Pleas of Stark County.

*Charles T. Upham*, for the motion.

*D. K. Watson*, Att'y-Gen., and *John Welty*, *contra*.

BY THE COURT. Section 5167, Rev. Stats., as amended February 22, 1889 (86 Ohio L. 51), relating to the drawing of grand and petit juries, which provides that the first fifteen drawn "shall be summoned as grand jurors, and those named as the remainder shall be summoned as petit jurors, and in case of challenge, inability to serve, or other cause, it becomes necessary to fill the panel, the whole of the number of persons so summoned as petit jurors shall be first exhausted before resorting to other means to fill the same," gives a rule for the filling of the panel for a petit jury, but does not relate to the filling of the panel for a grand jury. The latter is governed, as heretofore, by sec. 5171, Rev. Stats.

*Motion overruled.*

## ARMSTRONG v. NATIONAL BANK.

*Rule governing negotiable instruments payable to fictitious person or order—Where it applies—Where it does not—Checks payable to non-existing person or order—Duties of banks in relation thereto—Must be satisfied of genuineness of indorsement.*

1. The rule that a negotiable instrument made payable to a fictitious person or order, is, in effect, an instrument payable to bearer, applies only where it is so made with the knowledge of the party making it, and does not apply where the maker, supposing the payee to be a real person and intending payment to be made to such person or his order, is induced by the fraud of another to so draw it.
2. Where, by the fraud of a third person, a depositor of a bank is induced to draw his check payable to a non-existing person, or order, the drawer being in ignorance of the fact and intending no fraud, the bank on which the check is so drawn, is not authorized to pay it and charge the amount to the account of its customer, on the indorsement of the party presenting it, although it appears to have been previously indorsed by the party named as payee. Such indorsement is, in effect, a forgery, and the payment thereon by the bank, confers no right on it as against the drawer of the check.
3. In the absence of a course of dealing or understanding to the contrary between the parties, the duty of a banker is, in all cases, to pay to the person named, or his order, where the terms of the check are such; and he may, and should withhold payment until fully satisfied as to the genuineness of the indorsement.

(Decided October 29, 1889.)

**ERROR** to the Circuit Court of Meigs County.

The original action was a suit by Kate S. D. Armstrong against The Pomeroy National Bank to recover of the bank the sum of \$450.00, due her upon a deposit she had made with the bank. She averred that she had given a check payable to one William Brown or order, that had been procured from her by the fraudulent practices of one Grimes, who represented himself as acting for the said Brown in the negotiation of a note; that there was no such person as Brown, and that the note was fraudulent, of all which she was ignorant at the time; that Grimes afterward indorsed the check "William Brown," and, adding his own indorsement, presented it to the bank who paid it.



The principal ground of defense was that plaintiff was negligent in delivering the check to Grimes, and that it used ordinary care in paying it to Grimes, indorsed as it was. The case was tried to the court who, upon the request of the parties, found its conclusions of law and fact separately, as follows:

## FINDING OF FACTS.

"1. That the defendant is a banking corporation organized under the laws of the United States.

"2. That on August 31, A. D. 1882, plaintiff had on deposit with defendant, subject to be drawn out by her check, a sum of money greater than the amount of the check hereinafter to be described.

"3. That on said 31st day of August, A. D. 1882, one J. S. Grimes, by a fraud practiced upon plaintiff, by negotiating to her as the pretended agent of one William Brown, a fictitious person, a forged promissory note negotiable in form, induced her to draw and deliver to him, as pretended agent of said Brown, the following check:

POMEROY, O., *August 31, 1882.*

Pomeroy National Bank, pay to William Brown or order, four hundred and fifty dollars, (\$450).

(Signed)

K. S. D. ARMSTRONG.

"4. That there was no such person as the above named William Brown; that plaintiff supposed (at the time) there was, and believed she delivered the check to said Brown, through his agent, said Grimes.

"5. That she was not careless or negligent respecting the transaction, but instead was ordinarily careful and prudent in respect thereof.

"6. That said Grimes on the same day, (August 31, 1882), wrote the name William Brown across the back of said check and presented it to defendant for payment; that defendant having no knowledge respecting the way Grimes had obtained

---

Armstrong v. National Bank.

---

it, or that the name "William Brown" was the name of a fictitious person, paid the same and charged the amount thereof against the account of the plaintiff.

"7. That defendant in paying the check to Grimes made the usual inquiries respecting his identity, and in other respects was ordinarily careful and prudent in relation to the transaction.

"8. That plaintiff before the commencement of this action demanded of defendant the payment of said sum by it paid to said Grimes, which defendant then refused, and has not, either before or since said demand, paid the same or any part thereof."

## CONCLUSION OF LAW.

"That the payment of the check by defendant to said Grimes was not (by the facts above found) authorized by said plaintiff, and could not legally be made a charge against her in the account between her and the defendant respecting the money she had on deposit with it, and that the amount named in the check, together with interest thereon, at the rate of six per cent. from the day she made the demand, above found to have been made, for its payment to her, is due and payable from defendant to her."

A motion for a new trial having been made and overruled, judgment was entered for the plaintiff upon the findings.

The judgment of the common pleas was reversed on error by the circuit court; and this proceeding is prosecuted to obtain a reversal of the circuit court and an affirmance of the common pleas.

*E. A. Guthrie*, for plaintiff in error.

The check made by the plaintiff was drawn on a deposit she had in the bank. She thus set apart and appropriated to William Brown's use so much of her deposit as would be necessary to satisfy it. *Morrison v. Bailey et al.*, 5 Ohio St. 13-17; *Andrew et al. v. Blachly et al.*, 11 Ohio St. 89; *Dodge v. Nat. Exchange Bank*, 30 Ohio St. 1-5; *Merchants' Bank v. State Bank*, 10 Wallace, 647; *Blair and Hodge v. Wilson*, 28 Grat. 170.

But in the case at bar there was no "William Brown." She had been induced by the fraud of Grimes to draw the check payable to "William Brown or order,"—she believing him to exist, and that Grimes was acting as his agent. There being then no payee of the check, the right to use it, as such, was not assigned to any one. The paper was not in fact a check, a payee being a necessary party to that instrument. *Merchants' Bank v. State Bank, ut supra*; 2 *Daniel on Neg. Instruments*, 528 and notes, 532; *McIntosh & Lytle*, 26 Minn.

It is to be remembered that Mrs. Armstrong was found to have been careful and prudent in respect of the issuing of the check. Grimes represented himself to be the agent of "William Brown," authorized to borrow money on "Brown's" promissory note. He succeeded in deceiving her, and she lent the money, not to Grimes, but to "Brown." She drew her check payable to "Brown" or his order. This she delivered to Grimes, not in his own right, but as the agent of the pretended "Brown." Now, as there was no "Brown," and the check was handed to Grimes as "Brown's" agent, it could only become his, as such agent, and in no other sense. Therefore the instrument never became a valid check for any purpose. It never was delivered. *Crawford v. West Side Bank*, 100 N. Y. 50.

How then could Grimes render it valid? The circuit court seems to have held, that he could do so, by the commission of a second crime: by forging "Brown's" indorsement.

Mrs. Armstrong exercised caution to the extent of requiring the bank to pay out of her deposit the money to "William Brown or order."

This the bank did not do; but paid it on the forgery of "Brown's" indorsement. Although the finding is in general terms that "the defendant in paying the check to Grimes made the usual inquiries in respect to his identity, and in other respects was ordinarily careful and prudent in respect to the transaction," this must be taken in connection with the specific finding that Grimes had forged the indorsement of the check. Now in respect to the forgery and the payment of the check to Grimes on the strength of that forgery, these were

---

Armstrong v. National Bank.

---

*res inter alios acta*, as to Mrs. Armstrong. Grimes was not her agent. She had dealt with him as "Brown's" agent. She had given the bank no right to treat him otherwise than at arm's length. She had even been prudent enough to say to the bank "pay his money to Brown or his order." Under the law, could the bank be justified in paying it otherwise? *Ellis & Morton v. Ohio Life Ins. and Trust Co.*, 4 Ohio St. 667; *Hall v. Fuller*, 5 B. & C. 750; *Johnson v. Wendle*, 3 Bing. N. C. 225; *Roberts v. Tucker*, 12 Q. B. 560.

"The duty of a banker is to pay the checks and bills of his customer drawn payable to order, to the person who becomes holder by a genuine indorsement; and he can not charge him with payments made otherwise, unless the circumstances amount to a direction from the customer to the banker to pay the paper without reference to the genuineness of the indorsements, or are equivalent to a subsequent admission that the indorsement is genuine, in reliance on which the banker is induced to alter his position." *Dodge v. Nat. Exchange Bank*, 20 Ohio St. 234; *same v. same*, 30 Ohio St. 1.

In the case at bar, Mrs. Armstrong knew nothing, and did nothing, concerning the check or its payment after she passed it to Grimes. *Morgan v. Bank of State of New York*, 11 N. Y. 404; *Graves v. American Exchange Bank*, 17 N. Y. 205; *Welsh v. German American Bank*, 73 N. Y. 424; *Indiana Nat. Bank v. Holsclaw*, 98 Ind. 85; *Canal Bank v. Bank of Albany*, 1 Hill 287; 2 Daniel on Neg. Instruments, 611; 2 Parsons on Notes and Bills, 81; *Wheeler v. Gould*, 20 Pick. 545; *Crawford v. West Side Bank*, 100 N. Y. 50; *Star Fire Ins. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442.

Although the check was made to an imaginary person, it is not the case of a check to a "fictitious person," as mentioned in the books. The latter are cases where the maker of the instrument *purposely* draws it to a fictitious person; these are considered as made to order, and are transferable by mere delivery. *Forbs & King v. Espy, Heidlebach & Co.*, 21 Ohio St. 483; 1 Daniel on Neg. Instruments, 116, 117, 118, 119, 120.

Nor does it present the case of a check drawn payable to a particular number, or to "bills payable," which are also construed as payable to order. 2 Parsons on Notes and Bills 65.

*F. C. Russell*, for defendant in error.

The first question presented is, what was the legal effect of the paper in the hands of Grimes? I say, although it was payable to the order of William Brown, there being no such person it was payable to bearer, therefore, did not need the indorsement of Brown. 2d Add. Morse on Banking, 254; *Levy v. Bank of America*, 24 La. 220; Cited in 13 Am. Rep. 124; Abbott's Trial Evidence, 453, Paragraph 127; *Lane v. Krekle*, 22 Iowa, 399; 21 Ohio St. 474; *Blodget v. Jackson*, 40 N. H. 21; *First Nat. Bank of Parkersburg v. Johns*, 22 W. Va. 520; Randolph on Commercial Paper, secs. 161, 162, 163, 164, 697; 2d Nebraska, *Rogers v. Ware*, 29.

Secondly--That plaintiff having made her check and delivered the same into the hands of the said J. S. Grimes, the agent of a fictitious person, she authorized the said J. S. Grimes, to do anything with the check that was necessary to be done to make the instrument what she had authorized it to be, and cite: Daniels on Negotiable Instruments, Vol. 1, sec. 139. See also same section 136 and note 3; 40 N. H. 21; 2d edition Morse on Banking, 254; 1 Vol. Wait's, Actions and Defenses, 508, Par. 12; *Levy v. Bank of America*, 24 La. 220; cited in 13 Am. Rep. 124; *Smith v. Mechanics' & Traders Bank*, 6 Am. 610; Randolph on Commercial Paper, secs. 161, 162, 163, 164, 697; *Rogers v. Ware*, 2 Nebraska, 29; *Lane v. Kreickle*, 22 Iowa, 399.

Thirdly—A bank in the payment of a check is only required to know the genuineness of the drawer's signature and the person to whom they pay the money, and in this case it is admitted they know both, and cite: 1 Vol. Wait's, Actions and Defenses, 508, Paragraph 12; *Levy v. Bank of America*, 24 La. 220; cited in 13 Am. Rep. 124; Randolph on Commercial Paper, sec. 697.

Fourthly—Where two innocent persons must suffer, the one who first placed the means in the hands of the party to

---

*Armstrong v. National Bank.*

---

commit the fraud must suffer the loss, and cite: *Levy v. Bank of America*, 24 La. 220; cited 13 Am Reports, 124; *Lane v. Kreickle*, 22 Iowa, 399; *Griggs v. Home*, 31 Barbour, 100; *Putnam v. Sullivan*, 4 Mass. 45; cited 3 Am. Dec. 206; *Bank v. Smith*, 55 N. H. 593; Daniel on Negotiable Instruments, Par. 805; *First National Bank of Parkersburg, v. Johns*, 22 W. Va. 520; cited 46 Am. Reports, 506.

While in the case at bar both parties are found by the court to have been ordinarily careful, yet that must be taken in connection with the facts in the particular case, and the first negligence is cast upon the party who was so easily deceived, and placed her check in the hands of the said Grimes, to enable him to commit the fraud. 24 La. 220; Daniels on Negotiable Instruments, Par. 805; *Griggs v. Home*, 31 Barbour, 100; *Bank v. Smith*, 55 N. H. 593.

MINSHALL, C. J. This case is in its general features analogous to that of *Dodge v. The National Exchange Bank*, 20 Ohio St. 234, and should, as we think, be ruled by it. There a paymaster of the United States, who kept his account at the bank, drew his check on the bank in payment of an indebtedness of the United States to Frederick B. Dodge, and delivered it to the person who presented the certificate, he representing himself to be Dodge. This representation was false, and the person making it was a thief. Being a stranger to the paymaster, he at first refused to pay the claim to him, but on his assuring him that he could identify himself at the bank, the paymaster drew the check payable to Dodge or order, and delivered it to the person presenting the certificate. The amount of the check was paid him by the bank on his representing himself to be Dodge and indorsing the check in that name. The bank had no knowledge of what had transpired prior to the presentation of the check for payment, and supposed it was paying it to the right person. In deciding the case the court laid down the following principles:

"1. The duty of a banker is to pay the checks and bills of his customer, drawn payable to order, to the person who becomes holder by a genuine endorsement; and he can not

charge him with payments made otherwise, unless the circumstances amount to a direction from the customer to the banker to pay the paper without reference to the genuineness of the indorsement, or are equivalent to a subsequent admission that the indorsement is genuine, in reliance on which the banker is induced to alter his position.

"2. When there is no fraud, or special understanding between the banker and his customer, the liability of the banker for paying a check upon a forged indorsement, can not be affected by conduct of the customer in drawing the check, of which the banker had no notice."

The case was again brought to this court upon a question of evidence, and was assigned to and disposed of by the first commission, which, after a full and careful re-examination, approved and followed the former decision; and the principles announced in the case after such careful consideration must determine this one.

By the fraud of one Grimes the plaintiff was induced to purchase a note that had no real existence as a security. She is found by the court to have been ordinarily careful and prudent in the transaction, but was deceived. She supposed that she was purchasing a valid security belonging to a man, as represented by Grimes, by the name of William Brown, and for whom, as he represented, he was acting as agent, and gave to the assumed agent for Brown a check for the amount, payable to Brown or his order. Now it is evident, both upon reason and the authority of the previous decisions, that the circumstances under which the plaintiff was induced to give the check, even though calculated to arouse suspicion on her part, cannot modify the duty required of the bank in the matter of paying or not paying the check. It is not claimed that the bank had any knowledge of how or under what circumstances Grimes had obtained the check, and there is no finding of any such course of dealing between the bank and the plaintiff as would have authorized it to depart from the general duty of a bank in paying the checks of its customers, drawn payable to a certain person or order. It was its duty to pay to the person named or his order, and to withhold payment until it

---

Armstrong v. National Bank.

---

was satisfied, both as to the identity of the payee and the genuineness of his signature. *Morse on Banking*, sec. 474; *Roberts v. Tucker*, 16 Q. B. 560, per Maule, J., at p. 578.

It is found that the bank made the usual inquiries respecting the identity of Grimes, and in other respects was ordinarily careful and prudent in relation to the transaction; but this must be taken in connection with the further fact that Grimes was not the payee of the check, and that his indorsement, without the genuine indorsement of the payee, could confer no title upon the holder of the check, or any interest in it, as against the drawer. "There is no doubt," says Lord Kenyon in *Tatlock v. Harris*, 3 T. R. at p. 181, "but that the indorsee of a bill of exchange, payable to order, must in deriving his title, prove the handwriting of the first indorser." See *Mead v. Young*, 4 T. R. 28, 30; 2 Parsons N. & B. 595. The indorsement on the check, purporting to be that of the payee, Brown, had been placed there by Grimes, and was either a forgery or a fraud, and, for the purposes of this case, it is not material which it is termed. As to it the bank acted upon the representations of Grimes, and did not otherwise know whether it was genuine or not. As said in *Dodge v. The Bank*, 30 Ohio St. 1: "The rightful possession of a check by no means carries with it or implies a right to demand or receive payment of it, without the genuine indorsement of the person to whose order it is made payable;" and if a banker accept or undertake to pay a check, "he must see to it, at his peril, that he pays according to the terms of the order, and to the party named therein, or to one holding it under the genuine indorsement of such payee. \* \* \* And this is true, whether the defendant exercised the degree of caution which bankers usually do in such cases, or not. The question is, was the check paid to the party to whom, by its terms, it was made payable?" Therefore, the court rightly concluded, as a question of law from the facts found, that the payment of the check by the defendant was not authorized by the plaintiff, and that it could not rightly be charged to her account.

The fact that the check was made payable to a person that had no existence does not alter the rights of the plaintiff as



against the bank, for she supposed that Brown was a real person, and intended that payment should be made to such person. The doctrine that treats a check or bill made payable to a fictitious person, as one made payable to bearer, and so negotiable without indorsement, applies only where it is so drawn with the knowledge of the parties. *Tatlock v. Harris*, 3 T. R. 174, 180; *Vere v. Lewis*, *Id.* 182; *Minet v. Gibson*, *Id.* 481; *s. c.* in the House of Lords on error, *Gibson v. Minet*, 1 H. Bl. 569; *Collis v. Emett*, 1 H. Bl. 313; *Gibson v. Hunter*, 2 H. Bl. 187. The doctrine that a bill payable to a fictitious person or order, is equivalent to one payable to bearer, had its origin in these cases, which all grew out of bills drawn by Levisay & Co., bankrupts, payable to a fictitious person or order, and were accepted by Gibson & Co.; but it will be noticed that the holding in each case was upon the express ground, that the acceptor knew at the time of his acceptance that the bill was payable to a fictitious person; and but for this fact the fictitious indorsement would have been held to be a forgery—some of the judges expressing a doubt whether it was not so, although its character was known to the acceptor. (3 T. R. 181). These cases will be found reviewed in a note to *Bennett v. Farrell*, 1 Campb. 130. It was held in this case that a bill made payable to a fictitious person or order, is neither payable to the order of the drawer or bearer, but is completely void. But in an addendum to the case, at page 180c of the report, Lord Ellenborough observes that this holding must be taken with this qualification: “unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor.” The rule with this qualification is stated as the law, in Byles on Bills, 73. See also to the same effect *Forbes v. Espy*, 21 Ohio St. 483; 1 Rand. Com. Paper, § 162, § 163, § 164; 2 Parsons, N. & B. 591 and note (a). Mr. Daniels in his work on Negotiable Instruments, § 139, states the rule to be general, but, as shown by Mr. Randolph, the cases do not bear out the text. 1 Rand. Com. Paper, § 164 note (4). And upon principle we do not see how the law could be held to be otherwise. For if the fictitious character of the payee is unknown to the drawer, whoever in-

---

Armstrong v. National Bank.

---

dorses the paper in that name with intent to defraud, perpetrates a forgery and the indorsement is void, a general intent to defraud being sufficient to constitute the offense.

The case of *Lane v. Krekle*, 22 Iowa, 399, is not in point; for there the note was made payable to a fictitious person "or bearer," and passed by delivery without indorsement. The case of *Phillips v. Im Thurn*, 114 Eng. C. L. 694, cited by the learned judge, is clearly distinguishable from the case before us. There the signature of the drawer as well as the indorsement was a forgery; but the defendant, the acceptor, was held liable because the plaintiff discounted the paper, relying in good faith upon the *acceptance* of the defendant. The case was finally disposed of on a case stated, reported in 1 Law Rep. C. P. 463. The ground of the decision appears from the following observations of Keating, J., p. 472: "I think, upon the facts stated in this special case, that it was not competent to the defendant to deny the genuineness of this bill. He knew that the plaintiffs were willing to advance money upon the bill only upon his vouching by his acceptance of it the authenticity of the drawing. His acceptance amounted to a representation to the plaintiffs, which enabled the person representing Plana to obtain money from the plaintiffs on the bill." The decision in this case simply followed a well recognized principle in the law of notes and bills. It is thus stated by Mr. Smith: "Though the drawer's signature be forged, the drawee, *if he accepts the bill*, is bound to pay it, provided it be in the hands of a holder *bona fide* and for value, for the drawee's acceptance admits the drawer's handwriting to be genuine." Smith's Mercantile Law, 334. Now, Mrs. Armstrong can in no way be said to have affirmed by any act of hers that the indorsement upon the check was genuine, for there was no indorsement on it when it left her hands.

The case of *Rogers v. Ware*, 2 Neb. 29, cited by counsel for defendant in error, does not support his contention. The case of *Ort v. Fowler*, 31 Kan. 478, was rested upon a number of grounds; and, in so far as it may have been on the ground that a note made payable to a fictitious person or order is in effect payable to bearer, irrespective of the knowl-

edge of the maker, it simply follows the authority of 1 Daniels Neg. Inst. § 139, which we have shown is not borne out by the cases relied on.

If the drawer of a check, acting in good faith, makes it payable to a certain person or order, supposing there is such person, when in fact there is none, no good reason can be perceived why the banker should be excused if he pay the check to a fraudulent holder upon any less precautions, than if it had been made payable to a real person; in other words, why he should not be required to use the same precautions in the one case as in the other; that is, determine whether the indorsement is a genuine one or not. The fact that the payee is a non-existing person does not increase the liability of the bank to be deceived by the indorsement. The fact is that an ordinarily prudent banker would be less liable to be deceived into a mistaken payment by a fictitious indorsement such as this was, than by a simple forgery. The determination of the character of any indorsement involves the ascertainment of two things: (1) the identity of the indorser, and (2) the genuineness of his signature; and no careful banker would pay upon the faith of the genuineness of any name, until he had fully satisfied himself both as to the identity of the person and the genuineness of his signature. Now, a careful banker may be deceived as to the signature of a person with whose identity he may be familiar; but he is less liable to be deceived where both the signature and the person whose signature it purports to be, are unknown to him. In making the inquiry required in such case to warrant him in acting, he will either learn that there is no such person, or that no credible information can be obtained as to his existence, which, with an ordinarily prudent banker, would be the same as actual knowledge that there is no such person, and he would withhold payment, as he would have the right to do in such case. But still, if he should be deceived as to the existence of the person, he would, nevertheless, require to be satisfied as to the genuineness of the signature. Of this, however, he could not be through his skill in such matters, and on which bankers ordinarily rely, for he would be with-

---

Finley v. Whitley.

---

out any standard of comparison, and he could have no knowledge of the handwriting of the supposed person, for there is no such person. So that, if he acts at all, it must be upon the confidence he may place in the knowledge of some other person, and if he choose to act upon this, and make, instead of withholding, payment, he acts at his peril and must sustain whatever loss may ensue. It is a saying frequently repeated in "The Doctor and Student," that "he who loveth peril shall perish in it." In other words, where a person has a safe way and abandons it for one of uncertainty, he can blame no one but himself if he meets with misfortune.

The case of *Vagliano Brothers v. The Bank of England*, recently decided in England by the Court of Appeal, 23 Q. B. D. 243, and called to my attention since the above opinion was written, fully supports the conclusion we have reached.

*Judgment of the circuit court reversed, and that of the common pleas affirmed.*

---

FINLEY v. WHITLEY.

*Bill of exceptions—When not a part of the record—When court will not weigh the evidence.*

1. A bill of exceptions that is not taken at the trial term or within thirty days thereafter, but taken on overruling a motion for a new trial that has been continued to a term of the court subsequent to the trial, can not be regarded as a part of the record, for the review of alleged errors of law occurring at the trial, in the admission or rejection of evidence, or in the charge of the court or refusal to charge as requested.
2. Where, on overruling such motion for a new trial, the bill of exceptions so taken embodies the charge of the court as well as all the evidence, this court will not weigh the evidence for the purpose of determining, whether the verdict was sustained by sufficient evidence, or was contrary to law, or whether substantial justice has been done, or a new trial ought to have been granted.

(Decided October 29, 1889.)

ERROR to the Circuit Court of Union County.

---

Finley v. Whitley.

---

*P. R. Kerr and Cameron Woodburn*, for plaintiffs in error.  
*S. S. Gardiner, W. T. Hoopes and D. W. Ayers*, for defendant in error.

DICKMAN, J. The original action was commenced in the Court of Common Pleas of Union county by William Whitley, the defendant in error, against J. J. Finley and P. R. Kerr, the plaintiffs in error. Whitley in his petition alleged, that on the 30th day of July, A. D. 1885, the defendants imprisoned him and deprived him of his liberty for the space of one hour, unlawfully and with force, on a pretended charge of assault; that while he was so imprisoned, the defendants took and hauled away of his property one large load of unthreshed wheat, of the value of \$18.00, and after obtaining such property, released him, and thereafter refused to prosecute the charge of assault. \* \* \* He asked judgment against the defendants for damages in the sum of two thousand dollars.

Finley, for his separate answer to the petition, denied each and every allegation in the petition contained. Kerr, for answer, denied each and every allegation contained in the petition, and further said, that on the 30th day of July, 1885, he filed with one F. M. McAdams, a justice of the peace, an affidavit charging Whitley with an unlawful assault upon him; that the justice issued a warrant for the arrest of Whitley, and deputed J. J. Finley to serve the same; that he went with Finley to the home of Whitley, and pointed out Whitley to Finley, who then and there arrested Whitley; and that he, Kerr, took no further part in the arrest, and did not further prosecute the plaintiff on the charge.

The case was tried to a jury, at the February term, 1886, and a verdict was returned in favor of the plaintiff for \$370.62. A motion for a new trial was made and continued to the next term.

No bill of exceptions was allowed and signed at the trial term, nor within thirty days thereafter. At the next, or May term, 1886, the motion for a new trial was overruled, and judgment was rendered on the verdict for \$200.00, upon the plaintiff's consenting to a *remittitur* of all above that sum. On the

overruling of the motion for a new trial, a bill of exceptions was taken by the defendants, containing all the testimony given on the trial by either party, together with the charge of the court to the jury. The bill of exceptions also set forth, that during the progress of the trial, the defendants excepted to certain rulings of the court, whereby testimony offered by the plaintiff was allowed to go to the jury, and testimony offered by the defendants was excluded; and, that the defendants excepted to a portion of the charge of the court to the jury, and to the refusal of the court to charge the jury as by them requested. But no exception, taken by the defendants during the trial, was reduced to writing and presented to the court for allowance during the trial term, or within the statutory period after such term.

On petition in error to the circuit court, the judgment of the court of common pleas was affirmed, and this proceeding is instituted to reverse the judgment of the circuit court.

Whether the trial court erred in the admission or rejection of evidence, or in misdirection to the jury, or in a refusal to charge the jury as requested, cannot be considered in this proceeding, as no such error of law occurring in the course of the trial has been saved by bill of exceptions. Under the statute as it stood in 1886, it was essential for the party objecting to the decision of the court upon a question of law arising during the trial, to except at the time the decision was made; and when the decision was not entered on the record, or the grounds of the objection did not sufficiently appear in the entry, the party claiming to be prejudiced by the ruling was required to reduce his exception to writing, and bring the question on the record by bill of exceptions allowed and signed at the trial term, or within thirty days thereafter. Revised Statutes, sections 5297-5302. For error of law occurring at the trial, the bill of exceptions should be perfected while all the facts and circumstances are fresh in the recollection of the counsel and the court. *Hicks v. Person*, 19 Ohio, 426, 437. And although the exception be in fact taken, if not reduced to writing within the time limited by the statute, it will be regarded, in law, as no exception; nor, will the court have

power to dispense with the consequences by a continuance of the motion for a new trial. As said by Gholson, J., in *Kline v. Wynne*, 10 Ohio St. 228: "If upon a motion for a new trial, for a cause of error of law occurring at the trial, a continuance of that motion to a subsequent term, will enable the court to reduce the exception to writing at such subsequent term, with precisely the same effect as if it had been done at the trial term, it is evident that the rule would have no positive or binding obligation, but might, in every case, be dispensed with at the pleasure, or in the discretion of the court." See also *Dayton v. Hinsey*, 32 Ohio St. 258; *Estabrook v. Gebhart*, *Ib.* 415; *Marietta & Cin. R. R. Co. v. Strader & Co.*, 29 Ohio St. 448; *Musser's Ex'r v. Chase*, *Ib.* 577; *Morgan v. Boyd*, 13 Ohio St. 271; *Kerr v. State*, 36 Ohio St. 614.

But it is contended, that although the motion for a new trial was continued to and overruled at the term next after the trial term, and although no bill of exceptions for error of law occurring at the trial was perfected within the time prescribed by statute, yet, the defendants below, after the overruling of such motion, having taken a bill of exceptions embodying the charge of the court as well as all the evidence, this court, in considering whether a new trial should have been granted, will look to the charge in connection with the evidence, with a view of determining whether the verdict was contrary to law or the evidence, and whether substantial justice has been done, or a new trial ought to have been granted.

We are to conclude from the record, that all the evidence given on the trial, with the charge of the judge, passed under the review of the circuit court, and that court, in affirming the judgment of the court of common pleas, is presumed to have determined that justice substantially had been done between the parties. But the same procedure does not, in our judgment, devolve upon this court. Section 6710, of the Revised Statutes, provides that, "the Supreme Court shall not, in any civil cause or proceeding, except when its jurisdiction is original, be required to determine as to the weight of the evidence." The manifest design of such provision, when considered in connection with the establishment of the circuit court,

## Shields v. Titus.

is to enable this court, as far as practicable, to limit its province to questions of law, without the necessity of examining all the evidence in a cause. But that object will not be fully attained, if, after a failure to save errors of law that arise during the trial, by bill of exceptions taken in due time, parties may evade the provisions of the statute, by seeking substantial justice through the medium of a motion for a new trial, on the ground that the verdict is not sustained by sufficient evidence, or is contrary to law. Whether the verdict is supported by sufficient evidence, it is clear, we need not inquire. And whether the jury have found contrary to the law, must depend upon the state of the facts ; but, to ascertain the facts must involve a determination by this court as to the weight of the evidence, which the statute provides shall not be required.

*In our opinion, the judgment of the circuit court should be affirmed.*

## SHIELDS v. TITUS.

*Easements—May be established by mutual agreement of adjacent owners—Agreement may be enforced in equity—Injunction a proper remedy.*

1. A way, laid out by an owner over his lands for the benefit of parcels thereof into which he subdivided them for sale, the boundaries of which way, the purchasers of the several parcels definitely establish by mutual agreement, and thereafter improve and use it for the benefit of their lands, is an easement annexed to the lands, and passes by a grant of the land without being mentioned in the conveyance. The grantee takes the rights his grantor had with respect to it, and holds his land subject to the burden it imposed.
2. Where proprietors of adjacent lands, by mutual agreement, definitely establish the boundaries of a private way previously laid out along their lines, and appropriate the strip of land embraced therein to be used as a perpetual easement for the benefit of the abutting lands of each, and the common benefit of all, and, in pursuance of the agreement, fence to the boundaries so agreed upon, and thereafter improve and use the way thus established, the agreement may be enforced in equity, at the suit of a purchaser from one of such proprietors, against a purchaser with notice from another. Injunction preventing the permanent obstruction of, or interference with such way, is a proper mode of enforcing the agreement.

(Decided October 29, 1889.)



**ERROR to the Circuit Court of Lorain County.**

The plaintiff in error commenced his action against the defendant in error, and Adam Seymour, in the Court of Common Pleas of Lorain county, by filing therein the following petition :

“ Plaintiff says that Alexis Miller, now deceased, was the owner of a large tract of land situated in secs. No. 5 and 6 in Avon Township, Lorain County, Ohio. That sec. No. 6 is bounded on the north by Lake Erie, and that along near the north side of said sec. No. 6 is, and has, been a public highway for over 40 years, known as the Lake Shore Road. During the life time of said Miller, he sold several pieces of land in this said tract, which, by a series of deeds, are now held, one piece by one Ann Robinson, another by one Nick Pitts, another by this plaintiff, and two other pieces by the defendant, Daniel Titus. That when said pieces of land were first severally sold by said Miller, there was and still is no public highway by which ingress and egress can be had to or from said land. That for the purpose of rendering said lands accessible by teams and vehicles, said Miller opened and constructed a lane or way to each piece of land so sold, to-wit: a lane or way commencing on said Lake Shore Road and running south to the north line of sec. No. 5. That said lane or right-of-way was opened and laid out for the benefit of said several grantees, their heirs, administrators and assigns, and all persons wishing to travel the same to reach said land. That said Miller also, at the time he established said way, was the owner of about 10 acres of land situated in said section 5, and at the south end of said lane, being one of the pieces now owned by said Daniel Titus, and that said lane furnished the only means of getting to and from said ten acres.

“ Plaintiff says said right-of-way or lane has been used, traveled over and occupied for the purpose of reaching said several pieces of land for the past twenty-five years, with the assent, acquiescence and knowledge and agreement of said Miller and his several grantees and their assigns to whom he

has conveyed the premises over which said way runs. That prior to the year 1875, one Joseph Fretter, by purchase, became the owner in fee of said ten acres of land in sec. No. 5 and of the land now owned by said Daniel Titus in sec. No. 6. That in that year 1875, the said Joseph Fretter, Ann Robinson, Andrew Seifert and this plaintiff, being at that time the owners of all the land over which said lane ran, for the purpose of settling definitely the width and exact location of said way mutually agreed between and among each other that said way should be thirty feet wide its entire length. That thereupon, by virtue of said agreement, each of said parties built fences along the sides of said way, to-wit: said Fretter built a fence 30 feet west of his said east line, and Robinson built a fence 30 feet west of the east line of about ten acres of land, and said plaintiff and said Seifert each built a fence fifteen feet east of the center of said lane across their respective farms; and said Robinson also built fences 15 feet west of said center of said lane across the remaining part of her said farm, thus making a lane 30 feet wide extending from said Lake Shore Road south to the south line of sec. 6. That large ditches were constructed, bridges built, and said road was otherwise worked and improved.

"That afterward said Joseph Fretter sold and by deed conveyed all his interest in any land in said Sections No's 6 and 5 to the defendant, Daniel Titus. Plaintiff says the land so sold to defendant, Titus, in section No. 6, is bounded as follows: On the north by the Lake Shore road, on the east by land owned by Thomas Shields, formerly owned by A. H. Bullock, on the south by land owned by Ann Robinson, and on the west by land owned by P. J. Miller. That said 30 foot lane runs over and across the east side of said land last above described. Said Robinson's land is just south of above described land, and the land so owned by said Seifert and said plaintiff in 1875, is adjoining said Robinson's said land on the east. Plaintiff says in the year 1875, he sold and conveyed all his right in his said premises to said Nick Pitts, who is still in possession and the owner thereof. That in the year 1878 he purchased the said farm of said Seifert, and now is in pos-

session thereof and the owner in fee. That said lane now furnishes, and has for 25 years, the only way to get to and from the land now owned by the said Robinson, Pitts and plaintiff. That defendant, Titus, when he purchased his said land of said Fretter, well knew all and singular the facts above set forth, and bought said premises subject to the perpetual right of plaintiff and the several owners of said several tracts of land, their heirs, administrators, executors and assigns, to use, enjoy, occupy, and travel said lane its entire length with wagons, vehicles and whatever conveyances, and when necessary to fully enjoy their said land.

"That defendant, Adam Seymour, claims some interest in the said farm of said Titus, by lease or otherwise. Plaintiff says that notwithstanding the facts above stated, said defendants, Titus and Seymour, now claim that said plaintiff has no right, title or interest in and to the possession or use of said lane or right of way. That they each now refuse to allow him to enter upon the part of said lane lying on the east side of the farm of said Titus, and threaten to forcibly eject him and his teams therefrom, and threaten to fence up the same, and threaten to and have already sued him for trespass for entering upon said lands with his teams, and threaten wholly to deprive him of the use of the same.

"Wherefore plaintiff asks that on the final hearing hereof he may be quieted in his right to the enjoyment of said right-of-way, as above set forth, and be decreed to have the right to use and enjoy the same together with his heirs, administrators, executors and assigns of said premises so owned by him, and that said defendants, their heirs, administrators and assigns may be forever enjoined from interfering with the use and enjoyment thereof for the purposes as above set forth, and for such other rights and equities that the court can give and law requires."

A general demurrer to the petition was overruled, and thereupon the following answer was filed:

"The defendant, Daniel Titus, for answer to the petition of said plaintiff says, he admits that one Alexis Miller, deceased, in his lifetime owned a tract of land in sections five and six in

Avon township in said county, out of which he sold in his lifetime in section six two small pieces, one to Aaron H. Bullock and one to Evan Richards, and conveyed the same to them respectively by deed; that the one, six acres, sold by said Miller to said Richards is now owned and occupied by one Catharine Pitts, and the one sold to said Bullock is now owned and occupied by the plaintiff; that across the northerly part of said section six there is and for many years last past has been a public highway, known and called "the Lake Shore Road;" that the said Miller in the sale of said six acres to said Richards did agree and covenant with said Richards that each should throw out fifteen feet of land respectively across said six acres for a private way, so that said Miller could reach his lands in said section five, and that the said Richards should have the right and privilege, together with his heirs and assigns, in consideration of said purchase and the throwing out of said fifteen feet from the west side of said six acres of traveling in a northerly direction, over and across the premises, to and from said Lake Shore Road at all times for the free use and enjoyment of said six acres; that one Ann Robinson now holds by a land contract, as defendant is informed and believes and avers the fact to be, about sixty acres of land, formerly owned in said sections five and six by said Miller, and has no way of ingress thereto and egress therefrom except of necessity over this private way to said Lake Shore Road.

"Defendant says that he owns a small piece of said land so owned by said Miller in section five, and all of section six so owned by said Miller, north of land as aforesaid by Ann Robinson, and west of land of the plaintiff, and lying between the lands occupied by said Robinson and the Lake Shore Road aforesaid; that the land of the said plaintiff lies next east of his, and fronts on said Lake Shore Road, which said road gives said plaintiff ample, free and easy access to his said premises and every part thereof.

"Defendant further answering, says that at the time said Miller sold said premises to said Bullock, no grant was conveyed to said Bullock to pass and re-pass over the premises now owned by this defendant, by deed or otherwise, and none

existed of necessity, and at the time said Bullock conveyed the same to said plaintiff, no right to pass or re-pass over and across the premises of this defendant through this private way aforesaid was conveyed to him, either by grant, implication or of necessity. Defendant avers he purchased said premises of one Joseph Fretter free and clear of all incumbrances, except the private right-of-way of said Catharine Pitts by grant, and of the said Ann Robinson of necessity; and defendant avers his said premises are free and clear of any incumbrance, right-of-way or servitude to the premises owned and occupied by said plaintiff.

"Defendant admits he has denied and still denies said plaintiff's right to travel over said private right-of-way in the use and enjoyment of his said premises; that he has brought suit against him in trespass for so doing and recovered a judgment therefor against said plaintiff which the said plaintiff has paid together with the costs of said suit, and has forbidden him to use and travel over said private way in connection with his said premises.

"Each and every other allegation and averment in plaintiff's petition not hereinbefore admitted to be true, defendant denies."

"*Second defense.*—Defendant further answering, says said plaintiff is known by several given names, to-wit: Vint Shields, Vincen Shields, Vincent Shields and Thomas Shields; that he and his friends use these names interchangeably when speaking to and of himself; that they all refer to and designate the same person, to-wit: said plaintiff, and he responds to and recognizes himself as the person meant whenever any of these given names are applied to him; that on or about the—day of July, 1884, the said defendants brought suit against said plaintiff, under the name of Vincent Shields, before A. W. Sherbondy, a justice of the peace in and for Avon township in said county, the said justice having full power and authority to hear said cause for trespass in traveling over said private way with his teams, wagons and on foot in the use of his said premises, at which trial the said plaintiff appeared and answered in said suit, and set up the same facts in

defense of said suit he now sets up in this action ; that after a full and fair trial before said justice of the peace and a jury, and after arguments of counsel, said defendants recovered a verdict and judgment on the merits of said action against said plaintiff in this petition, which judgment so obtained the said plaintiff paid, together with costs. Wherefore said defendants say said cause is *res judicata* and no right of action exists against them and in favor of said plaintiff. The said defendant therefore asks to be dismissed with his costs."

The plaintiff replied as follows :

"Now comes plaintiff and for reply to the answer filed herein says he admits that said Miller sold said 6 acre piece to said Richards with the agreement in said deed contained as alleged in the petition, and that said property is now owned by one C. Pitts. He further admits that he did purchase of said Bullock the lands as alleged in the defendant's answer, with all the appurtenances thereunto belonging. He avers that long before said purchase was made said Miller conveyed to said Bullock the perpetual right-of-way over the lane or road in controversy for the benefit of said premises, and the perpetual right to drain his surface water into a ditch or drain running along the side of said lane next to the land of said Bullock. He admits that said defendant purchased from one Fretter who held his title from said Miller, and he avers that said defendant purchased said property with full knowledge of said encumbrance upon it. And further replying denies each and every allegation therein contained except those explained or admitted above, and asks that the prayer of his petition may be sustained."

Upon the trial of the cause, at the October term 1885, the court found the issues for the plaintiff, and rendered judgment in his favor as prayed for.

A motion for a new trial was overruled, but no bill of exceptions was taken, nor was there any finding of facts by the court.

The defendant Titus prosecuted error to the circuit court, where the judgment was reversed, solely on the ground, as ap-

pears from the record, that "the court of common pleas erred in overruling the demurrer to the petition."

A reversal of the judgment of the circuit court is now sought here.

*Metcalf, Webber & Johnson*, for plaintiff in error.

The petition shows that defendant's, grantor and plaintiff, agreed upon this lane, fenced it, bridged it and worked it; that defendant knew all this when he bought the land over which it runs; that he bought it subject to the plaintiff's right to travel it. The parties owning the land over which this lane runs had a right to agree upon the lane. For aught that is disclosed the agreement was in writing. The presumption is it was, if a contract or agreement of this kind must be made in writing. Defendant when he bought his farm had a right to buy it subject to this right of way, and for aught that appears this right of way was reserved in his deed. Defendant by his demurrer admitted all the facts stated in the petition to be true. *Hance v. Hare*, 25 Ohio St. 349; 6 Allen, 341; 2 Wait's Actions and Defenses, 682, and cases there cited; *Nathan v. Lewis*, 1 Hun, 239, 245; 1 Walker & Bate's Digest, 346, 347; 6 Am. Law. Reg., 718; 2 D. 261, 267.

If a material fact is not alleged in a petition, if it appears by the finding of the court that it was supplied by the evidence, so that the defendant could not have been injured by the absence of the averment, the judgment will not be reversed. *Davis v. Hines*, 6 Ohio St. 47; 30 Ohio St. 308; 33 Ohio St. 555, 562.

The answer and reply raise an issue that could support the finding of the court of common pleas.

*Johnson & Leonard*, for defendant in error.

I. The plaintiff brought his action upon the wrong side of the court. His prayer is for quieting of title, injunction and equitable relief. His action should have been brought at law. It is only in special cases, where special grounds for equity interference are set forth, that equity will interfere for encroachment upon an easement. 2 Waite A. and D. 749 and 750; 3

Waite A. and D. 700-708 ; Wash. Ease, 575 and 576 ; 2 Story's Equity, § 925 and § 926 ; *Smith v. Wiggins*, 48 N. H. 109 ; *Bank v. Debolt*, 1 Ohio St. 591 ; *McCoy v. Chillicothe*, 3 Ohio, 379 ; *Culver v. Rodgers*, 33 Ohio St. 537.

II. The petition shows no right to the statutory remedy to quiet title. Actions to quiet title are of two kinds, the statutory action, Rev. Stats., sec. 5779, and the chancery suit which still exists in Ohio. *Marsh v. Reed*, 10 Ohio, 347, 350 ; 2 Bates Pleading, 660. The statutory action is founded on possession. An easement is not capable of possession. Washburn on Easements, 2 ; Hilliard on Real Property, 61 ; *Munroe v. Ward*, 4 Allen, 150 ; *Redfield v. Railway Co.*, 25 Barb. 59 ; *Clark v. Hubbard*, 8 Ohio, 382 ; Tyler on Ejectment, 41 ; *Wicklows v. Lane*, 37 Barb. 246 ; 3 Blk. Com. 206 ; *Jackson v. May*, 16 John, 184 ; *Smith v. Wiggins*, 48 N. H. 109 ; *Jackson v. Hathaway*, 15 John, 454 ; *Miller v. Miller*, 4 Pick. 244 ; *Clark v. Hubbard*, 8 Ohio, 382 ; *Thomas v. White*, 2 Ohio St. 540 ; *Harvey v. Jones*, 1 Disney, 68 ; *Hoskins v. Alcott*, 13 Ohio St. 216 ; *Austin v. Goodrich*, 49 N. Y. 266 ; *Brown v. Harman*, 21 Barb. 508 ; Bates Pleading, 665, 906.

III. Under the chancery action to quiet title, it is none the less necessary that plaintiff should be in possession. *Bailey v. Briggs*, 56 N. Y. 407 ; *Scott v. Kramer*, 31 Ohio St. 295. Also cases cited under proposition II.

IV. To entitle to the chancery relief to quiet title it must appear that the plaintiff has established his title at law. *Marsh v. Reed*, 10 Ohio, 349 ; Wash. Easements, 575-6 ; Story's Equity, sec. 925, sec. 926 ; *Collins v. Collins*, 19 Ohio St. 470 ; see also 3 Waite A. and D. 701, and cases there cited. Also *Id.* 703 ; 2 Bates Pleadings, 663 ; *McCord v. Iker*, 12 Ohio, 387, 388.

V. On the injunction side of this petition, it is well settled that courts of equity will not interfere by injunction where the complaining party has an adequate and complete remedy at law. *Southard v. Stephens*, 27 Ohio St. 651 ; *Wilson v. Mineral Point*, 39 Wis. 163 ; *Gray v. Tyler*, 40 Wis. 579 ; *Bank v. Debolt*, 1 Ohio St. 591 ; *McCoy v. Chillicothe*, 3



Ohio, 379 ; Bates Pleading, 663 ; *Smith v. Wiggin*, 48 N. H. 109 ; 2 Waite A. and D. 747, and cases there cited.

VI. Equity will not interfere by injunction in cases like this unless it is alleged that otherwise great and irreparable injury will be done, and the facts must be stated which will make out such a case. *Van Wert v. Webster*, 31 Ohio St. 420 ; see also 1st Bates Pleading, 483, and cases there cited ; Wash. Easements, 575, 576 ; *Wilson v. Minn. Point*, 39 Wis. 160 ; 3 Waite A. and D., and cases there cited.

The cases in which equity will interfere by injunction to prevent encroachments upon an easement are collated 2 Waite A. and D, 749, 750, and generally in cases of trespass and nuisance, 3 Waite A. and D. 700-708. The petition does not come within the rule.

VII. The plaintiff does not show in his petition any right by easement or otherwise, in or to the land in controversy. He neither states it in terms or states facts which would amount to it in law. He nowhere states *the fact*. An easement must either be personal—in *gross*—or else attached to and existing for the benefit of some specific piece of realty. A way *in gross* is not transferable. Wash. Ease. page 8-161.

Except *in gross*, easements exist only for the benefit of specific real property. A way to reach one piece of land is one easement, to reach another piece, another easement. A way for a different purpose also makes still a different easement. Wash. on Ease. 8, 9, 91, 92, 93, 115, 128, 129, 160, 161, 162, 163, 196, 564, 565 and 566.

WILLIAMS, J. The issues of fact were found by the court of common pleas in favor of the plaintiff. No bill of exceptions was taken, nor was there any finding of facts by that court. The only question therefore before the circuit court, was whether the pleadings were sufficient to sustain the judgment ; and that is the only question here. The contention of the defendant is, that the petition does not state any right in the plaintiff to the way in controversy, and, if it does, then that no violation of the right is shown, of which equity will take cognizance.

1. In respect to the right of the plaintiff to the way, it appears that the person from whom the parties derive title to their lands, owned in connection therewith, other lands, which together constituted one tract. When he subdivided the tract, and sold the parcels now belonging to the plaintiff, and the defendant, and other parcels of the subdivision, he opened and constructed the way in question, "for the purpose of affording means of access to the several tracts sold, for the benefit of the grantees, their heirs and assigns, and of all persons wishing to travel the same to reach the land;" and also, to enable him to get to and from those portions of the land retained by him. Ever since, and during a period of twenty-five years next preceding the commencement of the action, the way so laid out and constructed, has been "used, traveled over, and occupied for the purpose of reaching the several pieces of land, with the assent, acquiescence, and agreement of the grantor, and his several grantees and their assigns," to whom the premises, over which the way ran, were conveyed. The respective owners of the lands on which the way was located, "for the purpose of settling definitely its width and exact location, mutually agreed between and among themselves that the way should be thirty feet wide, its entire length;" and thereupon, by virtue of the agreement, they built their fences so as to leave the way open as agreed upon, and thereafter constructed ditches and bridges, and otherwise improved it as a roadway. While the way was so opened, improved, and in actual use, the plaintiff, by purchase from one of the parties to the agreement alluded to, became the owner of one of the tracts of land embraced in the agreement, and the defendant purchased another of the parcels over which the way was so located, opened and used, from a proprietor who was also party to the agreement. It further appears, that the defendant purchased with knowledge of the existence of the way, and of the agreement made by his vendor with the other proprietors, and, that he bought his parcel "subject to the perpetual right of the plaintiff and the several owners of the other tracts, their heirs, and assigns, to use, enjoy, occupy and travel over the way, its entire length, with wagons, vehicles and other conveyances."

There can be but little doubt that the way, as originally established by the owner of the entire tract for the benefit of the parcels conveyed by him to purchasers, became an easement appurtenant to the lands granted, and not merely personal to the grantees. It was established for the beneficial use and enjoyment of the premises conveyed, and, was a burden imposed upon each parcel for the more complete and convenient use of the others. Each parcel, for the purposes of the way over it, became servient to the others, and they, in turn, were subject to a like servitude for its benefit.

The exact location and width of the way, so made appurtenant to their lands, were definitely settled by the mutual agreement of the owners, who placed their fences to the lines agreed upon, and thereafter improved and used it without objection. Such was the condition of the way when the plaintiff and defendant purchased their lands, and such, it continued to be, down to the time of its threatened interruption by the defendant. It was then, not simply a way of necessity, limited in duration by the necessity which originally gave rise to it, but became permanently appurtenant to the principal estates; and, under the well settled rule, each purchaser took his land with all the rights his grantor had with respect to it, and burdened with the servitudes he imposed upon it. As was said by Mr. Justice Story in *Hazzard v. Robinson*, 3 Mason, 279, "Whatever is actually enjoyed with the thing granted, as a beneficial privilege at the time of the grant, passes as parcel of it." A way is appendant or appurtenant to other lands, when it is granted for the convenience of their occupation without respect to the ownership or number of occupants. In such case, the right-of-way passes with the dominant estate as an incident thereto. *Boatman v. Lasley*, 23 Ohio St. 614. "Where an easement is secured to a dominant estate, and is designed to benefit the same in whosoever hands it may be, it will, as a general proposition, inure to the benefit of the owner of any part of the same into which it may be divided, provided the burden upon the servient estate intended to be created is not thereby enhanced." Washburn on Easements, 99. True, the terms

of the grant by which the plaintiff acquired his title, are not set out, nor is it averred that the right-of-way was granted in express language, or by the use of the word "appurtenances". It is averred, however, that he purchased the land, and "is in possession thereof and the owner in fee," which, we think, must be construed as being equivalent to an allegation of the grant of the fee simple estate in the land to him. And it is the established rule in this state, that the appurtenances to property pass with it, upon its alienation, without the use of the term privilege or appurtenance in the conveyance. *Morgan v. Mason*, 20 Ohio St. 401. In the case cited above it was held that a right-of-way, or other easement appurtenant to land, passed by a grant of the land, without any mention being made of the easement in the conveyance, and though neither the term appurtenance, or its equivalent be employed.

Neither is the defendant in any better position than his grantor; for, a grant of the servient estate, carries with it the burdens imposed upon it by the grantor, and the grantee takes it with all those burdens which appear, at the time of the sale, to belong to it. Washburn on Easements, 90. It not only appears, that at the time the defendant bought his land, the easement was apparent and in actual use, so that he might properly be charged with notice of its existence, but it is plainly alleged, that he bought with knowledge of it, and of all the facts relating to its establishment, and subject to it. These parties therefore, stand in the shoes of their respective vendors, and hold their lands with the qualities and burdens impressed upon them at the time of their purchase.

Granting this to be so, it is nevertheless contended by the plaintiff in error, that the agreement concerning the establishment of the way, is invalid, because it was verbal, and without consideration, and therefore ineffectual to create a servitude upon his land. Without stopping to consider whether, if the contract were verbal only, it would on that account be inoperative, notwithstanding its long recognition by the parties to it, and their performance of it, it is sufficient to say, that this ground of objection to the contract no where appears in the record.

It is true, the petition does not allege that the contract was in writing. It does however, allege that an agreement was made, which, as the term imports, must be construed to mean a valid agreement, one possessing all the requisites of a binding contract, unless upon the whole pleading, a different interpretation is required; which is not the case here. Besides, the defendant in his answer, does not make the defense that the contract was verbal merely, but denies that there was a contract. A written agreement, undoubtedly would have been competent evidence in proof of this issue; and, in support of the judgment, it will be presumed, in the absence of anything in the record to the contrary, that the finding of the court upon the issue, was sustained by competent, and sufficient evidence.

The definite establishment of the boundaries of the way, and the appropriation by each proprietor, of his lands embraced within them, for the mutual benefit of the lands of all, constituted a sufficient consideration to support the agreement. Each owner, secured a right or interest in the nature of a servitude in the lands of the others included in the way, and the benefit accruing to his estate from the use of the same.

2. The other question in the case, relates to the remedy. It is said, that equity will not interfere to restrain trespasses; that for such wrongs, the remedy is at law, and damages afford adequate redress.

The general rule, that equity will not exercise its jurisdiction where there is a plain and adequate remedy at law, is not denied; but where, as in this case, the threatened obstruction of an easement, would, if carried into execution, permanently destroy it, and defeat the plaintiff's right, the application of the rule may be doubted. After the mischief is done, the remedy at law may be neither plain or adequate. The damages are not always immediately appreciable, or capable of measurement by any certain rule. But it is not deemed necessary to place the decision upon that ground. We are of opinion, that the plaintiff may maintain his action in equity, to enforce the contract of his vendor, by restraining the destruction of the easement secured by it. Courts of equity,

---

Shields v. Titus.

---

will recognize and enforce agreements made by adjoining proprietors, concerning the occupation, and mode of use of their lands, not only, as between the parties to the contract, but as between their vendees with notice. And to warrant such equitable relief, it is not material that the agreement be binding as a covenant real running with the land, or that any privity of estate subsist between the parties. *Parker v. Nightingale*, 6 Allen 341; *Western v. McDermott*, L. R. 2 Ch. App. 72; *Tulk v. Moxhay*, 2 Phillips Chan. R. 774; *Talmadge v. Bank*, 26 N. Y. 105; *Seegar v. Harrison*, 25 Ohio St. 14.

In *Tulk v. Moxhay*, a covenant by the grantee of a piece of land, to use it as a private square, was enforced against a purchaser from the grantee with notice. The Lord Chancellor said, the question was not, "whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased." And he adds, "that the question does not depend upon whether the covenant runs with the land, is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it."

In *Western v. McDermott*, *supra*: "Each of the original owners of houses in a row entered into covenants with the original owner of all the land on which they stood as to what should be done in the garden attached to each house." It was held "that whether the covenants did or did not run with the land, a purchaser of one of the houses, with notice of the covenants, would be bound by them in equity;" and that the owner of a house who was injuriously affected by acts which were contrary to the covenants, might proceed against the party who commits them, to restrain the breach of the covenants.

In *Parker v. Nightingale*, *supra*, Bigelow, C. J., speaking of restrictions and limitations which may be put upon property by means of stipulations, fastening servitudes or easements upon it, and the jurisdiction of equity to enforce such agreements, says that such restrictions and limitations "derive their validity from the right which every owner of the fee has to dispose of his estate, either absolutely or by a qualified grant, or

to regulate the manner in which it shall be used and occupied. So long as he retains the title in himself, his covenants and agreements respecting the use and enjoyment of his estate will be binding on him personally, and can be specifically enforced in equity. When he disposes of it by grant or otherwise, those who take under him can not equitably refuse to fulfill stipulations concerning the premises of which they had notice. It is upon this ground that courts of equity will afford relief to parties aggrieved by the neglect or omission to comply with agreements respecting real estate after it has passed by mesne conveyances out of the hands of those who were parties to the original contract. A purchaser of land with notice of a right or interest in it existing only by agreement with his vendor, is bound to do that which his grantor had agreed to perform, because it would be unconscientious and inequitable for him to violate or disregard the valid agreements of the vendor in regard to the estate, of which he had notice when he became the purchaser. In such cases it is true that the aggrieved party can often have no remedy at law. There may be neither privity of estate nor privity of contract between himself and those who attempt to appropriate property in contravention of the use or mode of enjoyment impressed upon it by the agreement of their grantor, and with notice of which they took the estate from him. But it is none the less contrary to equity that those to whom the estate comes, with notice of the rights of another respecting it, should wilfully disregard them, and in the absence of any remedy at law the stronger is the necessity of affording in such cases equitable relief if it can be given consistently with public policy, and without violating any absolute rule of law."

It was held by this court in *Seegar v. Harrison*, 25 Ohio St. 14, that "Where the proprietors of adjacent lands agreed that each would appropriate from his land a strip to be used in common for a public street, and conveyances and improvements have been made on the faith that the street would be opened, the agreement may be enforced in equity, against a purchaser with notice, whether the public authorities accept the street as dedicated to public use or not." White, J., in

speaking of the remedy says, that "in the absence of fraud or mistake, the agreement ought, upon well established principles of equity, to be enforced, whether the public authorities accept the street as dedicated to public use or not."

Upon the same principle, where proprietors of adjacent lands, by mutual agreement, definitely establish the boundaries of a private way previously laid out along their lines, and appropriate the strip of land embraced therein to be used as a perpetual easement for the benefit of the abutting lands of each, and the common benefit of all, and in pursuance of the agreement, fence to the boundaries so agreed upon, and thereafter improve and use the way thus established, the agreement may be enforced in equity, at the suit of a purchaser from one of such proprietors, against a purchaser with notice from another. Injunction preventing the permanent obstruction of, or interference with such way, is a proper mode of enforcing the agreement.

*The judgment of the circuit court is reversed, and that of the common pleas affirmed.*

46 544  
56 146

#### NAIL & IRON COMPANY v. FURNACE COMPANY.

*Public road—Abandonment by non-user—When complete.*

Under a claim of abandonment of a road in a municipal corporation, proof that no work had been done on the road by the public authorities for fifteen years; that the road was at times in bad condition and impassable; that it passed over a steep hill; was difficult of use; that a new road had been established in the vicinity intended to take its place; that for eleven years before suit was brought travel had been substantially diverted to the new road, and that portions of the old road had been fenced in, are not sufficient to show abandonment by the public.

If non-user of such road may work an abandonment of it, the non-user must be shown to have extended over a period of twenty-one years.

(Decided October 29, 1889.)

ERROR to the Circuit Court of Lawrence County.



The action below was commenced by the defendant in error against the plaintiff in error, in the year 1884, to recover for damages to the lands of the Furnace company lying within the City of Ironton, by reason of the construction and operation of a tram railway on a public road within said city, upon which the lands abutted. One of the defenses interposed was that the alleged road was not such at the time of the building of the railway, but had been abandoned.

The railway was built in 1883. Evidence was given tending to show that work had been done on the public road about fifteen years prior to that date, but that, by reason of not being kept in repair, its use by the public practically ceased some three years after, though portions of it continued to be used; that the road passed over a steep hill, and was, in a sense, impracticable as a highway, and a new road had been established in the vicinity, intended to take its place; that travel, since the year 1872, had been almost wholly diverted to the new road, and that, in front of the Furnace company's land, and in other places, the old road had been fenced up for some time. But no statutory vacation had taken place, although a petition was filed for that purpose with the county commissioners in 1874, to which a remonstrance was interposed, and the proceeding abandoned.

At the trial the court charged the jury, among other propositions, the following:

“ Evidence has been introduced, by both plaintiff and defendant, as to this question of abandonment; as to whether this road has been abandoned or not, and I call your attention to those principles which will guide you in determining from the evidence whether the road has been abandoned or not. Whether the road has been abandoned is a question of intention, and this intention is to be ascertained from the acts and conduct of the parties, and the circumstances of the case. If the public acquired the right to use this road as a public highway, and did so use it, then the right existed, and before it can be said to be abandoned, the facts and circumstances must

show the fact of abandonment, and the intention to abandon it by the public. Look into the evidence to determine this question."

A verdict and judgment against the Furnace company having been rendered, error was prosecuted to the circuit court, where the judgment of the common pleas was reversed. To obtain a reversal of this latter judgment, this proceeding in error is instituted.

*W. A. Hutchins* and *W. H. Enochs*, for plaintiff in error.

We claim a public highway can be abandoned by the acts and conduct of the public. Take this case: The old road ran over the hill; a tunnel is made for the new and different road; the old road over the hill is fenced up. Is it necessary to go into court to have the old road over the hill, and almost over the tunnel, to be declared vacated, or is it not abandoned? It is said the law never requires a vain thing to be done, and this certainly would be the height of vanity. Suppose another case: A road passes down and up banks over a stream; a bridge is built across the stream; is not the old road down the bank, across the stream and up the bank on the other side abandoned as soon as the public adopts the bridge, and time has nothing to do with it? Is it not, in the language of the court in the charge to the jury, a question of intention?

In this case, a city is laid out over this old road with streets, lanes and alleys, and yet council claim there is but one way of abandonment, and that is by vacation as provided by statute.

The charge of the court below is sustained by the case of *Rittlemyer v. Flick*, 2 Clev. Rep. 115; *Fox v. Hart*, 11 Ohio, 414-416.

*A. T. Holcomb* and *Ralph Leete*, for defendant in error.

Defendant in error maintains that nothing less than an *exclusive, adverse* holding of the land and a *total abandonment* by the public, of the highway, for 21 years can extinguish the right of the public to the use of the road, unless vacated under the statutory provisions.

This doctrine is supported by the following authorities: Angel on Highways, page —; Wood on Nuisance, page 278; 27 Am. Report, page 295; Washburn on Easements, pages 669-670; 8 Ohio, 298; 19 Ohio, 367; 11 Ohio, 414; 13 Ohio St., 42; 5 Ohio St., 602.

The statute of Ohio requiring seven years *actual* abandonment of an *unopened road*, to vacate it, clearly implies that a road *opened* and used, must be vacated by statutory proceedings or by non-use for 21 years.

The charge of the court of common pleas, ignores *time*, as an element, and instructs the jury to guess at the *intention of the public*. The *intention* of the public can never be proven. Rev. Stats., secs. 4661 and 4683.

SPEAR, J. The question in the case is: Did the acts of the public in omitting to do work on the road for fifteen years, and in establishing another road as a substitute for it, and use of the new by the great proportion of the public for eleven years, taken in connection with the acts of adjoining owners in fencing portions of the old road, work an abandonment of it?

We think this question must be answered in the negative. However, the street in question may have been established, the right of the public can not have been less than if acquired by prescription. The easement thus acquired could be defeated only by a vacation in conformity with the statute or by non-user by the public for such length of time as would amount to an abandonment of it. The former is not claimed. Could the right, when so acquired, be lost by non-user in any less time than is necessary to acquire such right by prescription?

A dedication to public use may be presumed when acts and declarations of the owner indicate a purpose to dedicate, though the use has been for a period less than twenty-one years; but in order to presume a grant or dedication from use by the public, and acquiescence alone by the owner, such use and acquiescence must have continued for the period necessary to bar an action to recover possession of the land. The acts and declarations relied upon as showing intention to

dedicate must be clear and unequivocal, but, when shown, they are effective. Intent of the public is not so easily shown. A practical difficulty is met at the outset, viz., that a majority, even a large one, can not, in such cases, speak for, or give away, the rights of even a small minority.

In this state, adverse possession by a claimant to the whole or a portion of a street within a municipal corporation, in order to bar the corporation from its rights of control and enjoyment, must be continued twenty-one years. And it seems reasonable to hold that non-user by the public, in order to work abandonment of such a street, must be shown to have been as long continued as its use originally was necessary to raise a prescriptive right, or as long as an adverse claimant must show possession in order to maintain title by force of the statute of limitations.

That the road in question had been neglected and allowed to become in bad condition, and proved impracticable of use in part, and had been substantially supplanted by another, we think can have no bearing on the case. It does not follow that right of use is lost because more convenient facilities are furnished. Nor did the fencing in of portions of the street suspend or defeat the public right. Such exclusive occupation, for the time stated, could not ripen into a right, or be taken as indicating a purpose on the part of the public.

It appears to be well settled by the authorities that in order to work abandonment by simple non-user of an easement, all acts of enjoyment must have totally ceased for the same length of time necessary to create the original presumption, and we hold that where non-user by the public, of a street within a city is relied upon as proving an abandonment of it, such non-user must be shown to have continued for a period of twenty-one years.

The rule here indicated, is one easy of application, is consistent with accepted law on the general subject, is in harmony with the spirit of our statute law as to streets, and will, we think, be found to be sustained by *Washburn on Easements*, 550 to 559 ; *State v. Culver*, 27 Am. Rep. 295 ; *Ward*

---

Village of Shelby v. Clagett.

---

v. *Ward*, 7 Exch. 838 ; *Corning v. Gould*, 16 Wend. 531 ; 3 Kent's Com. 451.

Abundant provision is made by statute, (see section 4661, 4683, 2652 and 2655), where a road or street becomes useless, for the vacation of a county road by the commissioners, a township road by the trustees, and a street in a city or village by the council thereof, or by the court of common pleas. And no good reason exists why the statutory remedy may not be resorted to in all cases where there has not been a clear non-user of the street by the public for the period of twenty-one years.

*Judgment affirmed.*

---

VILLAGE OF SHELBY v. CLAGETT.

*Non-professional witnesses—When may give opinion—Defective sidewalks—When municipal corporations liable for injuries caused thereby—What is sufficient notice of defect—Notice to property owner, to repair—Effect of.*

1. A non-professional witness who has had opportunities to observe a sick or injured person, may give in evidence his opinion of the condition of such person, in respect of his being weak and helpless or not, and of the degree of suffering which he endured, provided such opinion is founded on his own observation of the person to whom his evidence relates, and is limited to the time that the person was under the observation of the witness.
2. In an action against a municipal corporation, to charge it with liability to one injured by a defective sidewalk, the cost of repairing which, could have been charged upon the adjoining property, it is no defense to show that the corporate funds had been exhausted in other necessary repairs, and to reject evidence tending to establish that fact is not error.
3. The extent to which immaterial matters may be enquired into upon cross-examination, rests in the sound discretion of the court in which the witness is being examined.
4. (a) In an action against a municipal corporation, to charge it with liability to one injured by a defective sidewalk, it cannot, as matter of law, be charged with notice of the defect that caused the injury, from the fact, merely, that it knew of the existence of a general defect in the same walk. To constitute knowledge of the general defect, notice of the particular one, they must at least be of the same general character, or the latter a usual concomitant of the former.

---

Village of Shelby v. Clagett.

---

- (b) A notice given to a property owner by a municipal corporation to repair a sidewalk is not, as matter of law, notice of any other defect than the one stated in the notice, or of one so related to it, that the existence of the latter, according to the usual course of affairs, may be reasonably inferred from the former.

(Decided October 29, 1889.)

**ERROR to the Circuit Court of Richland County.**

This action was brought by defendant in error in the Richland Court of Common Pleas to recover damages that she avers were sustained by her from a fall caused by an unsafe and dangerous sidewalk, within the village of Shelby, plaintiff in error.

She averred in her petition that the sidewalk in question had been improperly constructed, and by reason of the negligence of the village, had become unsafe and dangerous, because the boards composing it, which were laid crosswise, had become loose, of all which the village had notice, and by reason whereof she was violently thrown down and injured.

The village, by answer, put in issue, among other things, the averments of negligence and notice; and averred that the defect which caused the injury was latent and unknown to it, although it had used due diligence in the premises; which averments of the answer were put in issue by the reply.

The plaintiff below recovered a judgment in the court of common pleas, which upon error to the circuit court was affirmed, and thereupon this proceeding was brought by the village to reverse both judgments.

The other facts necessary to understand the questions decided will be found in the opinion.

*T. H. Wiggins*, attorney for plaintiff in error.

*Skiles & Skiles*, attorneys for defendant in error.

BRADBURY, J. It appears from the bill of exceptions taken in the court of common pleas, that Mrs. Clagett, accompanied by another lady, was passing along the sidewalk in question, when her companion stepped on a loose board which tipped

---

Village of Shelby v. Clagett.

---

up, tripped and threw Mrs. Clagett. The walk was made by placing four 3 x 4 oak stringers on the ground, lengthways with the walk, and nailing narrow boards across them. The two center stringers had settled more than the two outside ones, causing the walk to become slightly dished, and at each of two places a board had been nailed over the walk to cover holes that had formed in it. The walk had been examined by the street commissioner a short time before the accident, and a report made by him to the council that it needed repairs, and the council had notified the adjacent owner to repair it by June 6, eleven days before the accident occurred, the notice stating that if the owner did not repair by that day the village would make the repairs at its expense, but neither the report of the street commissioner to the council, nor the notice given by it to repair, state the kind of repairs needed, and none were made up to the time of the accident.

The plaintiff below strenuously contended that the sidewalk was in bad condition generally, and needed general repairs, and gave evidence tending to support that view; on the other hand, the defendant below insisted that the walk was in good condition generally; that its street commissioner had shortly before the accident examined it, and discovered no loose boards or other defect that tended to make it unsafe, and that there was nothing in the appearance of the walk up to the time of the accident to indicate that any of the boards had become loose, or that the walk was at all dangerous, and that the only defects in the walk were that it had become slightly dished, owing to the settling of the two middle stringers, and that at two places a board had been nailed over holes; and evidence was introduced tending to support this contention.

The plaintiff in error insists that the great weight of the testimony supports its views of the condition of the sidewalk, and asked this court to review the case on the facts. This has been done by the circuit court, and we discover nothing in the case requiring us to depart from the rule that exempts this court from passing upon the weight of the evidence.

Defendant below excepted to certain rulings of the court of common pleas, at the trial, in admitting and rejecting evidence.

The evidence admitted over the objection of the defendant below, related either to the condition of Mrs. Clagett's health, or to the pain she suffered; and, as far as we deem necessary to examine it, was given by non-professional witnesses, and partakes of the nature of opinion more than of fact. For instance, Mrs. Webber testified that "she (Mrs. Clagett) was in a very helpless condition, never leaving her bed, except to have her bed made each day, so far as I know;" and again, "her suffering was very intense, and often seemed more than she could bear." These statements, except that portion of the first one respecting her "never leaving her bed, etc.," are, in a strict sense, opinions, or inferences drawn from what the witness had observed while in attendance about the person of Mrs. Clagett. Now, the witness could portray to the jury only in a faint and imperfect way the scene in the sick chamber as it presented itself to her, and upon which she based her statements that Mrs. Clagett "was very helpless \* \* " and "suffered intensely \* \* ." The tones of voice, the expressions of the face, and the movements of the limbs, which are the natural language of pain, so readily and clearly understood by those about the sufferer, cannot be reproduced so as to impress the jury as they did the witness; neither can those appearances that accompany and establish the fact of weakness and helplessness. Therefore, to say that those about a sick or injured person shall not be permitted to give in evidence their opinion, based on observation, of the condition or suffering of the patient, is to exclude from the jury the only efficient proof of those facts. The rule admitting such evidence is one of necessity. Where the fact to be established must "be derived from a series of instances passing under the observation" of witnesses, "which yet they never could detail to the jury," opinion will be received. *McKee v. Nelson*, 4 Cowan, 356; see *Steamboat v. Logan*, 18 Ohio, 396, where this rule in 4 Cowan is quoted with approval; see also *Stewart v. State*, 19 Ohio, 302; *Yahn v. Ottumwa*, 22 Am. Law Reg. 644 and note on page 653; 7 Am. & Eng. Encyclopedia of Law, 492; *Parker v. Steamboat Co.*, 109 Mass. 449. And when it is remembered that the intelligence, fairness, opportunities to observe, and other cir-



cumstances affecting the credibility of the witness, can be called out by a cross-examination, there remains but little solid objection to the reception of this class of testimony.

Counsel for the village offered in evidence the ordinance fixing the rate of taxation for the village, for the year 1882, for the purpose of showing, in connection with evidence of the value of the taxable property within its limits, the amount of revenue collected for street purposes, and that all of it had been expended in other necessary repairs. This evidence was rejected by the common pleas court, and exceptions taken. Counsel contend this was error, because the evidence tended to rebut the charge of negligence in omitting to repair the defect complained of, and cite in support of his contention the cases of *Rooney v. Inhabitants of Randolph*, 128 Mass. 580; *Monk v. New Utrecht*, 104 N. Y. 552.

These cases arose under statutes of their respective states, and in each case the work was to be done at the public cost, and if it be conceded that in this state, when repairs are to be made at the expense of a municipal corporation, a want of funds would be a defense against a liability for damages for an injury caused by a neglect to repair, yet the principal could not be applied to the present case, for the village could have discharged its duty in this respect by requiring the owner of the adjacent property to make the necessary repairs, or upon his default caused them to be made, and charge the cost upon that property; and the united credit of the village and the adjacent property would, no doubt, be sufficient for that purpose, though the village treasury was, at the time, empty. The evidence was therefore immaterial, and for that reason properly rejected.

During the cross-examination of the plaintiff, she was asked by counsel for the village if she had not been delivered of a bastard child. Her counsel objected to the question, and it was ruled out, to which ruling the village objected. The question was immaterial to the issue being tried, and it is the settled rule in this state that the extent to which, upon cross-examination, immaterial questions may be put to a witness, rests in the sound discretion of the trial court. *Wroe v. The*

---

Village of Shelby v. Clagett.

---

*State*, 20 Ohio St. 460 ; *Bank v. Slemmons*, 34 Ohio St. 142 ; *Hanoff v. The State*, 37 Ohio St. 178.

In the case here, the cross-examination was long and exhaustive, and the action of the court did not trench upon the rights of the village in this respect.

The court of common pleas refused to give to the jury certain special charges requested to be given by the village, some of which contained important legal propositions, which, if sound, were applicable to the facts of the case. There was a series of seven propositions ; all were refused, and the exception was general. Some of these propositions, at least, were unsound. Whether the exception in this case can be distinguished from those in other cases, where they have been held by this court to be insufficient to point out the error complained of, we do not determine. This labor is unnecessary, for the majority of the court hold that the judgment should be reversed for errors in the charge of the court as given, which were specifically excepted to at the time.

The first proposition of the charge as given, to which the village excepted, was the following : " If the corporation had notice that the sidewalk was generally defective, it is not material whether the precise defect which may have caused the injury was known or not."

That the sidewalk had become dished and generally defective in that particular was not disputed, and in view of that fact the majority of the court are of opinion the charge was misleading. The jury might well have understood that the village was charged, as matter of law, with notice of the defect that caused the injury, if it knew the sidewalk had become dished. In order to charge, as matter of law, a corporation with notice of a particular defect from its knowledge of the existence of a general one, the first should be of the same character with the latter, or at least so related to it that the particular defect is a usual concomitant of the general one. As, for instance, in the case before us, if the village knew that the boards placed across the sidewalk were generally loose, or, in default of that knowledge, knew the stringers had become rotten, so that the nails would easily draw from them, it might

---

Village of Shelby v. Claggett.

---

be chargeable with notice of the defect which caused the injury, although, in fact, it did not know that the particular board that tripped the plaintiff below was loose.

If, however, the general defect known to the village was not of a character to make the sidewalk unsafe, or was of a character totally unlike that which caused the injury, so that the existence of one afforded no presumption of the existence of the other, there is no sound principle which requires notice of one to constitute, as a matter of law, notice of the other. Even if there was such relation between them that one would frequently be found in connection with the other, yet it is not the province of the law to declare that proof of one is proof of the other. This is only done where the connection is universal, or so close that the law will not permit it to be denied. Again, take the case at bar; the village admitted that the walk was defective, in that it had become dishd by the settling of the middle stringers, but it strenuously contended that in other respects its condition was good; that the outside stringers were sound, the boards firmly nailed to them, and that there was nothing in its appearance to indicate that it was dangerous to pass over it. Evidence was given, which, if believed by the jury, would establish that contention. Now it can not be said that in the nature of things there is such close relation between a wooden sidewalk that has become dishd by the settling of the middle stringers, and the defect which caused the injury to Mrs. Claggett, as that from the first, the other is necessarily, as matter of law, to be presumed.

We are cited to Shearman and Redfield on Negligence, vol. 2, page 368, in support of the proposition given to the jury; but those authors, evidently, had in view defects of the same general character; for the cases of *Weisenberg v. Appleton*, 26 Wis. 56, and *Aurora v. Hillman*, 90 Ill. 61, which they cite in support of the proposition, were both cases in which the defect that caused the injury was of the same character, and fairly and naturally inferable from the general defect of which the corporation was shown to have had notice.

Counsel for the village also excepted to the following proposition, which was given in charge to the jury: "An order

given by the corporation to an adjacent land proprietor to repair the sidewalk "would be an admission of notice of defectiveness." It is, no doubt, true that a notice given by the corporation to repair is an admission of the existence of the defect ordered to be repaired, but is it, as matter of law, an admission of the existence of another defect, different in character, or of one having no necessary connection with it? In the case before us, the corporation admitted having knowledge that the sidewalk in question was dished and generally defective in that respect; that at each of two places a board had been nailed over a hole, and contended that it was these defects it had ordered to be repaired, and no others. It contended, not only that it had no notice of any other defect, but that in fact no other general defect existed, and this was the real contention between the parties respecting this part of the case. The plaintiff below introduced evidence to establish its contention that the sidewalk was old, the stringers decayed so that they would not hold nails, and the boards generally loose; while the village gave evidence tending to show that the outside stringers were sound, the boards firmly nailed to them, and the walk generally in good condition.

Under that state of the evidence it was misleading to instruct the jury that notice to repair was an admission of defectiveness. The only notice in dispute was whether the village knew of the defect that plaintiff below claimed caused her injury, and the jury must have understood the charge as referring to that defect. It was equivalent to saying that the notice to repair, which the village admitted it gave, was an admission of notice of the defect in dispute. It left nothing on this point for the jury to find. It ignored the fact that the village might have had knowledge of the dished condition of the sidewalk, or that boards had been nailed over small holes in it, and have required it to be repaired in these respects, while it had no notice of the defect that caused the injury, or even if there had been no such defect in fact. As has already been shown, the sidewalk may have been dished and yet remain sound and secure in respect of the defect complained of.

If this could be so, then notice of one cannot, as matter of law, be notice of the other.

We think the question, whether or not the village had notice of the defect in dispute, should have been submitted to the jury upon all the evidence in the case.

*Judgment reversed.*

---

BAILEY & CO. ET AL. v. CHILDS, GROFF & CO.

*Attachment—Property held by one officer under writ of, not subject to levy under a writ held by another officer—Garnishment.*

Different attachments of the same property may be made by the same officer (Revised Statutes, sec. 5535). But personal property held on attachment by one officer, is not subject to levy and seizure under writs in the hands of another officer. In order to attach property in the custody of an officer under legal process, unless the writ is placed in his hands, he must be proceeded against as a garnishee. (*Locke v. Butler*, 19 Ohio St. 587). And this rule is not changed by the assent of the officer holding the property, to the subsequent so-called levy.

(Decided Oct. 29, 1889.)

ERROR to the Circuit Court of Trumbull County.

*Homer E. Stewart*, for plaintiff in error.

No brief for defendant in error.

BY THE COURT. The sheriff of Trumbull county levied an attachment in favor of Morgan, Root & Co. upon the personal property of the debtor, and during his possession under the levy, Childs, Groff & Co. caused an attachment, issued by a justice of the peace against the same debtor, to be placed in the hands of a constable, who, with the assent of the sheriff, went through all the forms of making a levy on the same property. The constable returned on his writ that he "attached the property subject to" the previous levy of the sheriff, in whose possession the property then remained. Subsequently, and while the sheriff was still in possession of

---

Young, Treas. v. The Pennsylvania Company.

---

the property, writs of attachment procured by Joel J. Bailey & Co., and Edwards, Townsend & Co., against the same debtor, came to his hands, and were by him levied on the goods. The property was sold under an order of sale issued in the attachment proceeding of Morgan, Root & Co., and sold for more than enough to satisfy their claim.

*Held:* That the property in the custody of the sheriff was not subject to levy and seizure by the constable. While different attachments of the same property may be made by the same officer (Rev. Stats. sec. 5535), personal property held under attachment by one officer, can not be levied upon under a writ in the hands of another officer. In order to attach the property in the hands of the sheriff, he should have been proceeded against as a garnishee (*Locke v. Butler*, 19 Ohio St. 587). His assent to the so called levy did not change the rule.

*Judgment modified.*

---

YOUNG, TREASURER v. THE PENNSYLVANIA COMPANY.

*Findings of facts—Section 6710, Rev. Stats., construed.*

(Decided Oct. 29, 1889.)

ERROR to the Circuit Court of Holmes County.

*Critchfield & Huston*, for plaintiff in error.

*Rush Taggart*, for defendant in error.

BY THE COURT. A finding of fact, made by the circuit court from the evidence contained in a bill of exceptions in a case before it on error, is not authorized by sec. 6710 of the Rev. Stats., as amended May 4, 1885; (82 Ohio L. 230), and if in fact made, will present no question that this court will review.

*Judgment affirmed.*

## NEUBERT v. PHILLIPS.

*Practice—Supersedeas—Stay of judgment.*

(Decided Nov. 1, 1889.)

MOTION for a stay of execution in cause No. 2018, on the General Docket.

*Joshua R. Seney and H. S. Banker*, for plaintiff in error.

*Lee & Brown*, for defendant in error.

In the Circuit Court of Lucas county, the judgment of the court of common pleas, in favor of Neubert and against Phillips in a suit brought to recover the possession of certain land, was reversed and the cause remanded for a new trial; and a proceeding in error, brought by Neubert against Phillips, is now pending in this court for a reversal of the judgment of the circuit court, and an affirmance of the common pleas; and the present application is for a stay of the judgment of the circuit court, until the final disposition of the proceeding in error here.

*Held*: that this is not the proper practice in a case of this kind; *Schaeffer v. Marienthal*, 17 Ohio St. 183, 188. That the plaintiff in error here should apply to the court, to which the cause has been remanded for further proceedings, for a continuance of the cause until the final disposition of the case on error in this court. The court to which the cause has been remanded, may, in the exercise of a sound discretion, so continue it; but if it does not, the party making the application may save his rights by excepting to the overruling of his motion.

*Motion for supersedeas overruled.*

## SEEBAUM v. HANDY ET AL.

*Lien of feed-stable keeper under §§ 3212 and 3213 Rev. Stats.—Waiver of.*

1. The lien given the "person" by §§ 3212 and 3213, Revised Statutes, who furnishes feed and bestows care on a horse or other animal therein named, is a right in the nature of a common law lien to retain possession as a security for the charges; and may be waived by the "person" voluntarily parting with the possession to the owner without the charges being paid.
2. The plaintiff below was the keeper of a feed-stable in the city of Cincinnati. The owner of a horse, who lived out of the city, was in the habit of leaving it with the plaintiff, when in the city, to be fed and cared for as long as suited his convenience; when called for, the horse would be delivered to the owner, and not returned, except at such intervals as suited the owner's convenience when again in the city. The plaintiff kept an account in which the owner was charged with the feed and care of the horse from time to time, as it was left with him. On or about the 12th of November, 1884, the horse was called for and delivered to the owner, as usual; the charges for feed and care then amounted to over a hundred dollars. Shortly afterward the owner was killed by being thrown from his buggy. And some time after that, the horse was driven to the city by a brother of the deceased and left at another feed stable, from which it was replevined by the plaintiff in an action against certain children of the deceased, who claimed to be the owners of the horse.

**Held:** That the delivery of the horse was a voluntary one, and the lien, waived. Whether an express or implied contract to return the animal would have varied the rights of the parties, is not determined; for the reason, that no express contract was claimed, and none can be implied from the circumstances of this case.

(Decided November 19, 1889.)

**ERROR to the Circuit Court of Hamilton County.**

The action below was replevin for a horse. It was commenced in a justice's court, and appealed to the common pleas. The petition averred a special ownership in the plaintiff by virtue of a lien for feeding the horse and paying the expense of shoeing for more than ten days before the commencement of the action. The answer is in substance a general denial of the petition. The case was tried to a jury upon the issues joined, which found for the plaintiff, and assessed



his damages for the detention, at one cent. A motion for a new trial was then made on the ground of a misdirection of the court to the jury and a refusal to charge as requested. The motion was overruled and judgment entered on the verdict. The defendants tendered their bill of exceptions, which was signed and made a part of the record.

The bill sets forth all the evidence offered as to the existence of the lien, the charge of the court, and the instructions which were asked and refused. The evidence offered consisted of the testimony of the plaintiff and the items of his account, and is as follows:

*Plaintiff's testimony*—I keep a livery stable on Seventh street in Cincinnati, and have done so for many years.

Truman B. Handy, the father of the defendants, was in the habit for several years of putting up his horses at my stable; he paid me all his bills up to August 1, 1883. After that he paid me nothing on account of stabling, shoeing, feeding or expense of any kind of caring for the horse "Jim," which was replevied in this action.

This account (marked "A" and hereto attached), is a true copy of my account against said Truman B. Handy up to November 1, 1884.

He brought his horse to my stable five times between November 1, 1884 and November 12, 1884, for which I charged \$2.00 in addition to what is shown on this account.

Mr. Handy's habit was to drive into the city in the morning, drive his horse and buggy to my stable, deliver them to some employe about the stable and go about his business. In the evening, or when he wanted to use the horse, he would come to the stable and order his horse, and some one of my employes would then harness his horse and give him the reins, and he would then drive away. During the day I would have the horse fed and watered, and give him whatever attention he required. This was the usual course of business between us. I charged 40 cents a day for the feed and care of the horse when left at my stable in this way. I made out my bills every month, and my account shows at the be-

Seebaum v. Handy *et al.*

ginning of each month the amount of my bill for the preceding month; for instance, the charge of \$1.20 June 1, for stabling during May, 1884, shows that Mr. Handy stabled his horse there three days during that month. During the month of June he left his horse at the stable in the usual way twice, as shown by the charge of July 1. And during the month of July the horse was left there but one day, as shown by the charge of August 1, in said account. From the middle of August to the first of November, said horse was at my stable all the time, and I charged \$20.00 a month.

The last time the horse was at my stable before Mr. Handy's death, was, I think, November 12, 1884. On that occasion when Mr. Handy called for him he was harnessed and delivered to Mr. Handy in the usual way. Mr. Handy was living in Clifton at the time this bill was made.

Mr. Handy was killed, so it was reported, on the 15th day of November, by being thrown from his buggy.

On the 24th of November, 1884, this horse was driven into town by Charles E. Handy, defendant's brother, and was left by him at the stable of William H. Bristol, on Walnut street, and was taken from there by proceedings in replevin in this case.

On one occasion I was pressing Mr. Handy pretty hard to pay up his bill. He was a little irritated, and said: "Dammit, if you are afraid you won't get your pay you can sell the horse," I answered: "Oh no, Mr. Handy, I would not do that."

#### PLAINTIFF'S ACCOUNT.

*"Exhibit A."*

MR. T. B. HANDY, *Dr.*

*To R. SEEBAUM.*

1883.

August	1—To stabling during July.....	\$ 6 00
"	4—To horseshoeing .....	2 00
"	25—To a load of sawdust.....	3 00
September	1—To stabling during August .....	2 60

*Seebaum v. Handy et al.*

September	28—To cash for bringing back horse and buggy neat.....	5 00
October	1—To stabling during September.....	7 20
"	1—To horseshoeing.....	5 00
November	1—To stabling during October.....	12 55
"	1—To two loads of sawdust.....	6 00
December	1—To Stabling during November.....	11 00
"	1—To horseshoeing.....	2 00
1884.		
January	1—To stabling during December.....	13 60
"	1—To horseshoeing.....	3 75
February	1—To stabling during January.....	18 75
"	1—To horseshoeing.....	3 50
March	1—To stabling during February.....	13 75
"	1—To horseshoeing.....	6 30
April	1—To stabling during March.....	12 90
"	1—To horseshoeing.....	2 00
May	1—To stabling during April.....	3 60
"	1—To horseshoeing.....	2 00
June	1—To stabling during May.....	1 20
July	1—To " " June.....	80
August	1—To " " July.....	40
September	1—To " " August.....	10 65
October	1—To " " September.....	20 00
"	1—To repairing harness.....	45
November	1—To stabling during October.....	20 00
		\$ 197 10

Upon this state of the proof the court, among other things, charged the jury:

"If you should find that it was the uniform manner between these parties, that Mr. Handy would bring this horse to the stable, leave him there for a day, or part of the day, and take him away again, bring him the next day, or probably the next two or three days, without any definite arrangement as to time, there would arise an implied contract, when Mr. Handy took the horse away under these circumstances, that he would

---

*Seebaum v. Handy et al.*

---

return him again. In other words, there would not be under these circumstances, such a voluntary parting with the possession of the horse on the part of the plaintiff, in the case, as to work a waiver of the lien under these circumstances."

This was excepted to at the time, as were, also, other parts of the charge founded on substantially the same view of the law, and are, therefore, not inserted here. Nor, is it necessary to set forth the instructions asked and refused, as they are all contradicted by the part of the charge above given. The case turns upon this part of the charge. The judgment was reversed on error by the circuit court, and remanded for further proceedings.

*Burch & Johnson, and H. Marckworth & J. H. Marckworth,* for plaintiff in error.

Under the provisions of the Revised Statutes, (sections 3212 and 3213), a livery stable keeper who has furnished feed and care for a horse, has a lien therefor, which is not defeated by the voluntary delivery of the possession to the owner in the ordinary course of business.

At common law, a livery stable keeper had no lien; 2 Kent's Com. 630, note *d*. "By passing the statute in question, the legislature gives the livery stable keeper a lien, notwithstanding the fact that he does not at all times have possession of the animal." 10 Law Bull. 386. The legislature of Pennsylvania passed a law almost identical with ours; Penn. Laws, 1807, p. 162. The Supreme Court of that state, in *Young v. Kimble*, 23 Pa. St. 195, construes that statute in harmony with our view. The Tennessee statute, which is, in effect, the same as ours, has been similarly construed. *Caldwell v. Tutt*, 10 Lea 258.

We also call the courts attention to the following cases, *Munson v. Porter*, 63 Ia. 453; *Smith v. Morton*, 60 N. H. 511.

The act being remedial, must be liberally construed. *Eckert v. Donahue*, 9 Daley, (N. Y.) 214; *Swan's Statutes*, 615.

*J. F. Baldwin*, for defendants in error.

Defendants in error controvert the proposition of plaintiff in error, and claim that a livery-stable keeper, who has become

entitled to a lien on a horse for food or care under the provisions of secs. 3212 and 3213 of our Revised Statutes, loses his lien when he voluntarily delivers the possession of the horse to the owner, without any agreement for its return, provided the horse is never voluntarily returned.

Now, what is a lien? *Hammond v. Barclay*, 2 East. 227; *Gladstone v. Bierly*, 2 Merivale, 401; Bouvier Law Dic., title—Lien; Smith's Mer. Law, title—Lien, 688; 2 Kent's Com. 634. Possession is necessary to a lien. 2 Kent's Com. 638, 639; Smith's Mer. Law, 697; 2 Dane's Abr. 262; *Sweet v. Pym*, 1 East. 4; *Lickbarrow v. Mason*, 6 East. 21; *Haywood v. Warring*, 4 Camp. 291.

In adopting our statute in 1873, the legislature did not undertake to define the word "lien," but used it as if it had a settled and well understood meaning. It was well understood in Ohio, that possession of a chattel was essential to a lien thereon. *Jordon, Ellis & Co., v. James*, see 5 Ohio, 89. The legislature, therefore, must be presumed to have used that word according to its legal meaning, then well understood and established in this state.

Moreover, the use of the word "retain," in sec. 3213, shows affirmatively that the legislature presumed the stable keeper to be already in possession. For how could he *retain* that of which he was not possessed?

When Seebaum gave to Handy the possession of the horse, the last time he was at the stable, he must have decided to look to Handy personally for the amount of his bill, and not to the security of the horse. *Vinal v. Stafford*, 139 Mass. 126; *Perkins v. Boardman*, 14 Gray, 81; *Papineau v. Wentworth*, 136 Mass. 543; *Forth v. Simpson*, 66 Eng. Com. Law, 680.

There was no implied contract. When a person has patronized a stable or a hotel for many years, there is a *probability* that he will continue to do so, and this *probability* of future patronage constitutes the "good will" of the stable or the hotel; but it was clearly erroneous to say that this probability amounts to an "implied contract" or any duty or obligation to continue the patronage.

MINSHALL, C. J. Whether the instructions of the court to the jury stated the law applicable to the case made by the tendency of the proof, depends upon the nature and character of the lien given by sections 3212 and 3213, Rev. Stats., to a person who furnishes food and care for any "horse" by virtue of an agreement with the owner, to secure the payment of the same.

These sections are as follows :

"Sec. 3212. A person who feeds or furnishes food and care for any horse, mare, foal, filly, gelding, mule, or ass, by virtue of any contract or agreement with the owner thereof, shall have a lien therefor, to secure the payment of the same, upon such animal."

"Sec. 3213. A person feeding or furnishing food and care for any horse, mare, foal, filly, gelding, mule, or ass, shall retain such animal for the period of ten days, at the expiration of which time, if the owner does not satisfy such lien, he may sell such animal at public auction, after giving the owner ten days' notice in a newspaper of general circulation in the county where the services were rendered ; and after satisfying the lien and costs that may accrue, any residue remaining shall be paid to the owner."

It seems to us very clear upon a view of these sections, that the intention of the legislature was, in enacting them, to give to the person furnishing such food and care a lien upon the animal as a security for the food furnished and care bestowed, with the incidents of a lien at common law in analogous cases. The first section gives the "lien," and the next one provides the mode of maintaining and enforcing it: The "person" shall "retain" the animal for ten days, and if, at the expiration of that time, the owner does not satisfy the lien, he may, on giving the requisite notice, sell it at public auction.

The nature and incidents of a common law lien of this kind are well settled: It is a right to retain property until certain claims against it are satisfied; and possession is not only essential to its creation, but also to its continuance. Where the party voluntarily parts with the possession of the property upon which the lien has attached, he is divested of his lien.

2 Kent Com. 638; Smith's Mercantile Law, 697; *Sweet v. Pym*, 1 East. 4; *Lickbarrow v. Mason*, 6 East. 21; *Hammond v. Barclay*, 2 East 227; *Jordan v. James*, 5 Ohio R. 89, 98. In *McFarland v. Wheeler*, 26 Wend. 473, it is said, that, "the very definition of a lien as the right to retain, indicates that it must cease when the possession is relinquished. This principle, so clearly founded in reason and so congruous to public utility and the convenience of trade, is supported by the uniform testimony of the decisions."

The right to sell the animal upon notice and apply the proceeds to satisfying the lien, does not affect its classification with similar common law liens; it only gives a plain and simple remedy for enforcing the lien.

The evidence tended to show, and the charge of the court was applicable to, a case where the owner of a horse temporarily leaves it with the owner of a feed-stable to be fed and cared for; there is no definite arrangement as to time; it may be for less or more than a day; this depends upon the convenience of the owner who resides out of the city; when he wishes to return home, the horse is delivered to him, and the feed and care is charged to him in an account by the keeper. There is no express agreement at any time that the horse is to be returned. Now how, under these circumstances, it can be inferred, as the court charged the jury, that there is an implied contract on the part of the owner to return the horse, we are unable to see. The owner is, for the time, simply a customer of this particular feed-stable. The keeper may expect that when the owner again comes to the city he will again patronize him by sending his horse to his stable. But when this may be, he can neither rightfully demand to know, or expect to be informed. How would the owner, as a matter of law, violate any agreement for which damages could be recovered, if he should, in the meantime, conclude to change his patronage and never return the horse. If it were otherwise then it might be inferred that every customer of a store is under an implied contract to continue to deal with it. If he were in debt for goods previously sold, he might be under a moral obligation not to withdraw his custom until he had discharged what he owed,

but there would be no legal obligation to that effect, arising from the circumstances.

The lien provided by this statute does not arise upon contract. True, the feed must be furnished under an agreement with the owner, but where this has been done the statute creates the lien in favor of the party furnishing it, irrespective of any agreement therefor to that effect. The lien given is a right to retain the property, that is its possession, as a security for the debt, and if this right is not insisted on when the horse is called for, the owner can not be said to violate any agreement in not afterward returning it; for he has no notice of an intention on the part of the keeper to assert a lien, when the property is voluntarily delivered to him; and, therefore, any supposed agreement to return could only relate to a thing of which he has no notice, and, which in fact, has no existence.

Therefore, in a case like the one to which the court applied its charge, the person furnishing the feed and bestowing the care must, if he would assert a lien on the animal therefor, do so by retaining its possession when called for by the owner, unless his charges are paid. If he do not, and voluntarily deliver the animal to the owner, he must be held to have waived his right to assert a lien under the statute, and to be satisfied with the personal liability of the owner for the charges. Such is the rule in common law liens based on possession, and we see no reason why the rule should not apply here as well as there. It is more in harmony with the general policy of our statutes "which always strive to secure public registration when possession is not given and retained", and which expressly provide for such registration when they in terms create a lien not depending on possession." Holmes, J., in *Burton v. Frye*, 139 Mass. 126, 130. See also the following cases: *Perkins v. Boardman*, 14 Gray, 481; *Papinsau v. Wontworth*, 136 Mass. 543; *Forth v. Simpson*, 66 Eng. Com. Law, 680.

What should be the rule in cases where the animal is placed by the owner with a person to be fed and cared for, not temporarily—the horse being ordinarily kept at home or some-



where else by the owner—but, permanently for some time either definite or indefinite, presents a different question. In such case where the owner is allowed to use it, its voluntary delivery to him for such purpose, might be said to imply a contract to return the animal, and a failure to do so would be such a fraud as to estop the owner from setting up that the lien had been lost by such voluntary delivery. But this is not the case before us, and we express no definite opinion upon it at this time.

We have examined the cases cited by counsel for the plaintiff in error, but fail to find that they give any considerable support to his view of the case.

The case of *Young v. Kimball*, 23 Penn. St. 195, is simply to the effect that where the owner forcibly or clandestinely obtains possession of the subject of the lien, the lienor's right is not impaired by such deprivation of the possession. *Muhson v. Porter*, 63 Ia. 453, rightly holds that demanding more than is due, will not entitle the owner to replevin the property without paying what is due. And *Eckland v. Donahue*, 9 Daly, 214, holds that replevin of the property cannot be had by bringing it before the defendant had time to make out his bill and give notice of his intention to perfect a lien, as required by statute.

The cases of *Caldwell v. Tutt*, 10 Lea. (Ten.) 258, and of *Smith v. Marden*, 60 N. H. 509, would tend to support the case where animals are, for the time being, permanently left with a person to be fed and cared for, with the right in the owner to use them. In such cases it is held that the lien is not thereby affected as against a creditor of the owner. The possession of the animal by the owner under such circumstances is not regarded as terminating the bailment, the possession being constructively that of the bailee, and under an implied contract to return the animal as soon as the use is at an end. This seems somewhat plausible, but whether sound or not, we do not, for the reasons before stated, now determine.

*Judgment affirmed.*

---

The State v. Kinninger.

---

## THE STATE v. KINNINGER.

*Change of judicial subdivisions.*

The act of March 21, 1887 (84 O. L. 229), to repeal sec. 1 of "an act to change the sub-divisions in the second judicial district, and to provide for the election of an additional judge in the first sub-division," passed March 13, 1868 (65 O. L. 25), not having been passed by a concurrence of two-thirds of the members elected to each house, is invalid, and ineffectual to change Montgomery county from the first sub-division to the second sub-division of the second judicial district.

(Decided November 19, 1889.)

## MANDAMUS.

The case is sufficiently stated in the opinion of the court.

*Brotherton & Dustin*, for the relator.

*John A. McMahon*, and *J. M. Sprigg*, for the defendant.

DICKMAN, J. This is an application by the relator, Charles W. Dustin, an elector of Montgomery County, for the allowance of a writ of mandamus against Joseph E. Kinninger, deputy sheriff of that county, to compel him to give notice and issue a proclamation according to law, in the name of the sheriff, who is beyond the jurisdiction of this court, for the election of a common pleas judge of the second judicial district, in the second subdivision thereof, at the election to be held on the fifth day of November, 1889. By Article XI, Section 12, of the constitution, under which the state is apportioned for judicial purposes, it is provided that, "The counties of Butler, Preble, and Darke, shall constitute the first subdivision; Montgomery, Miami, and Champaign, the second; and Warren, Clinton, Greene and Clarke, the third subdivision, of the second district; and, together, shall form such district." By section one of an act passed March 13, 1868, "To change the subdivisions in the second judicial district, and to provide for the election of an additional judge in the first subdivision," (65 Ohio L. 25), the counties of Butler, Preble, Montgomery and Darke are made to constitute the

first subdivision; and Champaign and Miami, the second subdivision of the second judicial district. On June 12, 1879, an act was passed, to provide for the election of an additional judge of the court of common pleas in the second subdivision of the second judicial district (76 Ohio L. 156); the first election of such additional judge to be on the second Tuesday of October, 1879; his term of office to commence on the first Monday of November, 1879, and to continue five years. With the view of effecting a change in the first subdivision, and of restoring Montgomery County to the original second subdivision of the district, an act was passed March 21, 1887, (84 Ohio L. 229), enacting, that section one of the above entitled act, passed March 13, 1868, be repealed.

By virtue of the foregoing legislation, it is claimed by the relator, that Montgomery County is now in the second subdivision of the second judicial district, and that the deputy sheriff should be commanded to give the notice, and issue proclamation for the election of a judge, as asked in the petition. The answer of the defendant denies that Montgomery County is a part of such second subdivision, but avers that it is a part of the first subdivision. It alleges that the law under which the change is claimed by the relator to have taken place, to-wit: the law of March 21, 1887, to repeal section one of the act of March 13, 1868, was not passed by a concurrence of two-thirds of the members elected to each house, but by a majority only of the members elected, as shown by the journals of the house and senate. To the answer of the defendant the relator has filed a demurrer. The record presents the question, whether the act of March 21, 1887, was passed by a constitutional majority, and furthermore, whether after there has been a change by a two-thirds vote of each branch of the general assembly, from the judicial apportionment provided by Article XI of the constitution to a new legislative apportionment, there may be a change from such legislative apportionment to one different from that designated in the constitution, or to the constitutional apportionment itself, without the concurrence of two-thirds of the members elected to each house.

It is evident that the apportionment for judicial purposes, was not designed to continue without change or modification, during the life of the constitution. With the increase of population, and the formation of new counties, it was contemplated, that the districts of the court of common pleas might be increased and changed, and the subdivisions thereof changed, to meet the public convenience, and facilitate the efficient administration of justice. As provided by section 15, Article IV of the constitution, "The general assembly may increase or diminish, the number of the judges of the supreme court, the number of the districts of the court of common pleas, the number of judges in any district, change the districts, or the subdivisions thereof, or establish other courts, whenever two-thirds of the members elected to each house shall concur therein." The concurrence is required, it will be observed, not of a quorum, but of two-thirds of the members elected to each house of the legislature. But while changes were contemplated, this section wisely ordains, that the constitutional scheme of judicial apportionment shall not be subjected to the will of bare majorities, whether partisan or otherwise, whereby the judicial system may lose stability, and be weakened in its hold on the public confidence. And this policy has been uniformly adhered to since the adoption of the constitution. In changing the districts of the court of common pleas, or the subdivisions thereof, it has been generally recognized by the legislature as the established constitutional rule, that such change could not be effectual, without the sanction of a two-thirds majority.

In our judgment, when the judicial subdivisions marked out in Article XI have been constitutionally changed, the new apportionment becomes a permanent substitute for the original, until again changed by the concurrence of two-thirds of the members elected to each house of the general assembly. When the judicial apportionment named in the constitution is once changed, in whole or in part, in the manner provided by the instrument itself, the new arrangement is determined and fixed until altered by the prescribed rule. What is that rule? It is plainly laid down in section 15, of Article IV, above

cited. Without ambiguity, the legislature is thereby authorized to change the subdivisions of the several judicial districts—the number of subdivisions in each district being preserved—whenever the requisite number of members assent to the change. A judicial apportionment having been made, which, in the future, might demand revision or alteration from time to time, the constitution has left it to the wisdom and discretion of the general assembly to incorporate with it the needed changes, but has provided a safeguard in the requirement of a two-thirds majority, as it has required that either branch of the general assembly may propose amendments to fundamental provisions of the constitution, only when the same shall be agreed to by three-fifths of the members elected to each house.

It is contended, however, in behalf of the relator, that although the act of March 21, 1887, to repeal section one of the act of March 13, 1868, was not passed by a majority vote of two-thirds, yet, that the act restores Montgomery County to the original second subdivision, and thus leads the way back to the normal or constitutional condition, and hence should not require more than a mere majority vote. But, to repeal section one, by a majority vote merely, would, in our view, be to change in plain violation of section 15, Article IV of the constitution, the subdivisions of the second judicial district, the first subdivision of which, composed of Butler, Preble, Darke and Montgomery counties, has stood for more than twenty years. The first subdivision as now constituted, it is to be presumed in the case at bar, was created by the concurrence of the requisite number of members elected to each house of the general assembly, and to destroy its unity, would certainly be a change of the most marked and decided character. The question is asked, what would become of Montgomery County, were section one repealed even by a majority vote of two-thirds, but with no further legislative action, if that county were not allowed to take its original place in the constitutional arrangement of judicial subdivisions. Such a case is not before us for consideration. But, it is not to be anticipated that the legislature would ignore its trust, or abandon

its functions, by failing or neglecting to assign that county to some other judicial subdivision.

The provision of section 15, Article IV of the constitution, for changing judicial subdivisions, is intended to be uniform in its operation. But, such uniformity will not be attained by holding, that in a change from the constitutional apportionment a vote of two-thirds of each house shall be necessary, but shall not be necessary in a change from a judicial apportionment by the general assembly, in the event that such change would work a return to the original constitutional arrangement. There is not such inconsistency or incongruity in the operation of section 15, as that one judicial subdivision can be changed only by a majority vote of two-thirds, while a simple majority vote shall be adequate to change another subdivision.

We find nothing in the case of *State v. Wright*, 7 Ohio St. 333, cited in argument, that militates against the views which we have presented. In that case a clause of section 15 of Article IV of the constitution came under consideration, and it was decided that, the constitution of the state has not limited the power of the general assembly to abolish courts created by the legislature, nor its power to vacate the office of judges of such courts. But the case also recognizes the doctrine, that courts established by the constitution itself exist independently of the general assembly, and can not be abolished by it. In applying to the case in hand, that portion of section 15, which provides that, the general assembly may "establish other courts, whenever two-thirds of the members elected to each house shall concur therein," Brinkerhoff, J., says: "It is not difficult to conceive of very good reasons why the constitution should require a vote of two-thirds for the passage of an act establishing a new court, increasing the number of public functionaries, and possibly adding thereby to the public burdens, while the repeal of such act might be safely confided to the discretion of a simple majority." It is obvious, if the act repealing the law that established the new court, had been enacted for the additional purpose of establishing another court in its place, a less number of affirmative votes than two-thirds of each house

## National Exchange Bank v. Cunningham.

would have been insufficient for its passage. And so in reference to the constitutional rule that, subdivisions of judicial districts can be changed only when there is a concurrence of two-thirds of the members of each house, although generally it is sufficient for the enactment and repeal of laws if a majority of the members elected to each house concur, yet, when the design and effect of such repeal is, clearly, to change judicial subdivisions, the constitutional requirement of a two-thirds majority vote must be paramount, and govern the action of the general assembly. The rule of two-thirds having been expressly enjoined by the fundamental law, it can not be dispensed with by the legislature.

*Writ refused.*

## NATIONAL EXCHANGE BANK v. CUNNINGHAM.

46 575  
56 476

*Easements—Access to buildings.*

1. When the owner of an entire estate, makes one part of it visibly dependent for the means of access, upon another, and creates a way for its benefit over the other, and then grants the dependent part, the other part becomes subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee as accessorial to the beneficial use and enjoyment of the granted premises.
2. The owner of a lot situated at the corner of intersecting streets in a city, erected thereon a three-story building covering the whole of the lot. A stairway leading from the principal street to the second story of the building, was constructed in the corner room of the first story. At the landing of the stairway, and connected with it, a hall was made, extending across the second floor of the room next to the corner room, and connecting with the second story of the next adjoining room. The rooms on the second story were intended for offices, and to adapt them to such use, doors were made opening into them from the hall. Another stairway was also put in, running from the hall to the third story. The stairway leading from the street to the second story was, and is, the only means of access to the hall above, and to the rooms opening into it, and the use of the stairway was, and is, necessary to their proper use and enjoyment. While the premises were in this condition the owner sold and conveyed a part thereof described by metes and bounds, which included the hall connected with the landing of the stairway leading from the street, and the office rooms on the second

---

National Exchange Bank v. Cunningham.

---

floor opening into the hall, which had no means of access except through the hall, and by the stairway. The purchaser, with the knowledge of his vendor who retained the corner room in which was the stairway, immediately entered upon, and continued the use of the stairway as his only means of access to the hall and connecting rooms purchased by him.

*Held:* That by the conveyance, a right to the use of the stairway, passed to the purchaser, as an easement appurtenant to the premises conveyed.

(Decided November 19, 1889.)

ERROR to the Circuit Court of Seneca County.

The original action was brought in the Court of Common Pleas of Seneca County by *Edward J. Cunningham v. The National Exchange Bank* of Tiffin, Ohio, and *William H. Grapes*.

The petition charges that the bank, which is a corporation organized under the National Bank Act, became the owner of a lot sixty feet square at the corner of Washington and Market streets in the city of Tiffin, and erected thereon a three story brick building covering the whole of the lot. The first story consisted of three business rooms fronting on Washington street and one fronting on Market street. The corner room occupied by the bank as its banking house has a front of twenty-four feet on Washington street and extends back along Market street a distance of forty-five feet. The room immediately in the rear of the bank, fronts on Market street fifteen feet and has a depth of twenty-four feet. The other two rooms which are used for store rooms, each have a frontage of eighteen feet on Washington street and extend back the full depth of the lot.

The petition then alleges "that upon the twenty-four feet front, so fronting on Washington street, and north of, and adjoining the south side thereof, the bank, in erecting the building, erected a stairway leading from Washington street to the second floor of the building; and also then erected a stairway, upon the same line, from the second to the third floor of the building, and also then made a hall upon the second floor leading east from the stair landing to the east end



of the building; also another hall upon the second floor leading south from the stair landing to the room upon the second floor above the south store room, and also then erected another stairway from the hall last mentioned, leading from the second floor to the third floor of said building, and also then divided the second floor into eight or more rooms and connected the rooms with the halls by means of doors. That the second floor of the building so made by the bank now is, and ever since the erection of the building has been, used and occupied under the lease of the bank, and its grantees, for offices; and during the same periods, the stairway leading from Washington street to the second floor has been used by those occupying the offices; also by all the comers and goers into the building; and was during all of said time, and still is, the only way to reach the offices upon the second floor, and also the stairway leading to the third floor. That the stairways and the halls, also the right to use each thereof, are privileges and appurtenances belonging to the said building and to each and every part thereof. That on the 11th day of January, A. D. 1867, and while the building was unfinished and incomplete, the bank in consideration of the sum of thirteen thousand and five hundred dollars, to it paid by the defendant, William H. Grapes, bargained and sold and agreed to convey to the said Grapes, in fee simple, the following part of the said lands and tenements, upon which the said building then stood, together with all and singular the rights and privileges and appurtenances to the same belonging, including the right to use and enjoy for himself, his heirs and assigns, forever, the said stairways and halls; being all of the lot, and building upon it, except so much as are within the boundaries of that portion on the corner having a frontage of twenty-four feet on Washington street, and running back a like width the entire depth of the lot on Market street. That as a part of the said bargain and sale and agreement to convey, and concurrent therewith, the bank, for the consideration last aforesaid, agreed in writing with the said Grapes, to finish and complete the building in the manner and form afore described,

which was so done by the bank, on or about the first day of April, A. D. 1867, and since then no change or alteration in said building has been made. That on the first day of April, 1867, the said Grapes took possession of the premises so conveyed to him, and occupied the store room himself, for more than one year next thereafter, and during the same period the other store room, also the rooms upon the second and third floors, were occupied by different persons, under leases from the said Grapes, to whom they accounted for the rent; and that during the time aforesated, the stairways and halls were used by the said persons, and by all others who visited the rooms above the store rooms so conveyed to the said Grapes, and without the objection of the bank, or notice, or knowledge that it claimed an adverse right. That on the 14th day of January, A. D. 1868, the said Grapes, in consideration of the sum of sixteen thousand dollars to him paid by the plaintiff, bargained and sold and agreed to convey to the plaintiff, in fee simple, the same premises, together with the same rights, privileges and appurtenances, which the bank bargained, sold and agreed to convey to the said Grapes, including the right to use, forever, the said stairways and halls. That on the 14th day of January, A. D. 1868, the plaintiff entered into the possession of the premises so agreed to be conveyed to him, and ever since has had, and still has, through himself, and his tenants, such possession, together with the open and notorious, and until recently, the uninterrupted use and enjoyment of the said stairways and halls, and with the knowledge and acquiescence of the bank, and without demand by it for compensation therefor, or notice from it of an adverse right. That on the 11th day of April, A. D. 1867, the bank intending to fully execute its agreement to convey to the said Grapes, in fee simple, the said premises, and also the said right to use and enjoy, forever, the stairways and halls, did execute and deliver to the said Grapes its deed, conveying to him, in fee simple, so much of the south part of the north third of said in-lots sixty-six and sixty-five as is bounded by the lines aforesated, together with the privileges and appurtenances thereunto belonging, but unintentionally, and through mistake, omitted to grant in the said deed,

in express terms, to the said Grapes, and his heirs and assigns, forever, the right to use and enjoy the said stairways and halls. That on the 14th day of January, A. D. 1868, the said Grapes, intending to fully execute his agreement to convey to the plaintiff, in fee simple, the said premises, and also the right to use and enjoy, forever, the said stairways and halls, did execute and deliver to the plaintiff, his deed, conveying to the plaintiff, in fee simple, the same premises described in the deed of the bank to the said Grapes, together with the appurtenances thereunto belonging, but unintentionally, and through mistake, omitted to grant in the said deed, in express terms, to the plaintiff, and his heirs and assigns, forever, the right to use and enjoy the said stairways and halls. That the bank claims an estate and interest in the premises so bargained and sold and agreed to be conveyed by it to said Grapes, and by the said Grapes to the plaintiff, adverse to the plaintiff, and his estate and interest therein. That the bank claims that the plaintiff has no right to the use of the stairway leading from Washington street to the second and third floors of the building, or to the east hall on the second floor, and threatens, and is about to shut up and close the north end of the hall upon the second floor, which leads south from the stair landing upon the second floor, and thereby prevent the plaintiff and his tenants from using the said stairways and halls, also the second and third floors of that part of the premises so agreed to be conveyed to the said Grapes and the plaintiff, and will so do, to the irreparable injury of the plaintiff and his said premises, unless restrained by the order and judgment of this court. The plaintiff prays that the bank and each of its officers, servants and agents may be enjoined from any and all interference with the said rights of the plaintiff, from closing up or obstructing, in any manner, the said stairways or halls, or either thereof, from preventing or attempting to prevent the plaintiff, or those claiming under him, also all other persons, from the full, free and perfect use and enjoyment of the said stairways and halls, to go to and from the said second and third floors of the plaintiff's said premises."

The answer of the bank in substance admits that it owned the lot and erected the building, as alleged in the petition, but avers that the hall leading southward from the landing of said stairway in said bank building was only made for temporary purposes; and that the right to use said stairway or the entrance into said south hall therefrom, are not now and have never been intended to be any privilege or appurtenance belonging to said south building nor any part thereof, which Grapes and plaintiff during their respective occupancies well knew and acknowledged. The answer denies that on the 11th day of January, 1867, or at any other time, the defendant sold or agreed to sell or convey to Grapes, or any other person, the said stairway, or the use thereof, as a privilege or appurtenance belonging to the said south rooms, or ever included the right to use and enjoy for himself, or his heirs or assigns, forever, the said stairways and halls to said Grapes, in any conveyance or contract whatever. It denies that said stairway was ever used by the lessees of either Grapes or Cunningham without objection, or notice, or knowledge, on the part of Grapes or plaintiff of the adverse right and claim of the defendant. It denies that Grapes sold, or agreed to sell or convey, to plaintiff any right or claim in or upon said stairway as an appurtenance or otherwise to said south building. It further denies that the plaintiff, or his lessees, had uninterrupted use and enjoyment of said stairway without demand from the defendant of any compensation for such use and occupancy, or any notice to plaintiff of the adverse right and claim by the defendant; and avers "that the plaintiff promised and agreed to pay the defendant for the use of said stairway for his tenants in said building, in the second and third floors thereof, the sum of ——— dollars per year, and under such agreement, paid to the defendant, for such use and occupation of said stairway, at two or three different times, and at said payments for several years at a time, and about the—— day of January, 1880, made an agreement with the defendant to pay to him for the use of said stairway for said building the sum of fifteen dollars per year for each and every year that he should use the same."

The defendant Grapes, made default.

The plaintiff by reply, denied all the allegations of new matter in the answer. The case was tried at the September term, 1883, and a decree having been rendered for the plaintiff, the bank appealed to the circuit court, where, at the October term, 1885, the cause was tried, and at the request of the defendant that court separately stated its findings of fact and conclusions of law, which are as follows :

“The parties appeared with their attorneys and this cause was heard on the petition of the plaintiff, the answer thereto of The National Exchange Bank, of Tiffin, Ohio, the reply of the plaintiff, and the testimony.

“In consideration whereof, and upon the request of The National Exchange Bank, that the court should state the conclusions of fact separately from the conclusions of law, the court finds as conclusions of fact from the testimony, that The National Exchange Bank, of Tiffin, Ohio, duly became a corporate body as averred in said petition, and that it was located and doing its banking business in Tiffin, Seneca County, Ohio.

“That in the year 1866, the said bank purchased the lands first in the petition described, and immediately thereafter proceeded to, and did, erect thereon the said building in the petition described, and did complete the same in manner and form therein described.

“That to obtain the proper location for a banking room, the said bank was compelled to buy the whole of the said lot of land, on which the building was so erected, and that the two rooms, on the south of the banking room of the defendant, were so erected to be immediately sold.

“That the building was built of brick, three stories high, and divided into three separate business rooms, extending east and west and fronting west on Washington street of said city of Tiffin, the north room thereof being built twenty-four feet wide, with a stone front, on Washington street, and the middle and south rooms thereof each eighteen feet wide.

“That said business rooms were separated by solid brick walls, extending from the cellar to the roof of said building,

except that an opening was left in said wall, separating said north from said middle room, in the second story of said building, for a hall, extending south through the said middle room, and to the said south room, as hereinafter more particularly set forth

“That the first story of the north room of said building, was intended for a banking room, and of the middle and south rooms for business or store rooms, and that said rooms always have been and yet are so used.

“That in constructing the building, on the premises described in said petition, and the banking room on the north side thereof, a stairway was made, a stairs put up on the north side of and against the south brick wall of the banking room, above mentioned, and wholly within the banking room, and leading from Washington street to the second floor or story of said banking room, and also a further stairway was made and stairs put against the same side of the same dividing brick wall, of said banking room, commencing some feet east from the top, or landing, of the stairs first above mentioned, and leading up to the third floor, or story, of the banking room.

“That rooms, or offices, are made on the second floor, or in the second story of the banking room, and doors opened into them from the hall, or passage-way, formed by making said rooms, and the said stairways above mentioned, and a way leading from the one into the other.

“That between the top, or landing, of the first stairs and the foot of the second stairs, above mentioned, an opening was left, or made, in the brick, or south wall, above mentioned, of the banking room, and which separates it from the remainder of the brick building, from which said opening a hall was made, extending south to the south wall, or side, of the building, and which hall divides the second floor, and story, of the two store rooms of said building, south of the said banking room, into back and front rooms, or offices, and from which hall doors open into said front rooms, or offices.

“That the third story of the two store rooms, south of the banking room, is all in one room.

"That in constructing the building, the stairs above mentioned, and the hall last above mentioned, were the only way provided to get to the rooms on second floor, or in the second story, of the said two store rooms; except that a stairway and stairs were put up in both of the store rooms, leading from the first floor to the second floor of the back rooms of each of them, and thence a stairway and stairs were put up which conducted up to the third story or room over the two store rooms, but that in constructing the brick building, no other way was provided to get to the front rooms, or offices on the second floor, or story, of the said store rooms than the said stairway and hall above mentioned.

"That on the 11th day of January, 1867, when said building was finished and ready for occupancy, the said bank sold and conveyed, in fee simple, to the defendant, William H. Grapes, for the sum of \$13,500.00, the said middle and south rooms of said building and premises above mentioned, and which are described in the deed of conveyance therefor as follows:

"So much of the south part of the north third of in-lots numbered sixty-six (66) and sixty-five (65), in the first ward of the city of Tiffin, in Seneca County, Ohio, as is bounded by the following lines:

"Beginning therefor at the northwest corner of the middle third of the said in-lot No. 66, which point is also the northwest corner of the building of Charles M. Yerk on said middle third of said lot No. 66, thence northerly on and along the west line of said in-lot No. 66 to the south side of the stone column at the southwest corner of the new bank building on said north third of said lot No. 66, thence eastward and northerly around said stone column to the center of the brick wall on the north side of the room adjoining said new building or room on the south side thereof, thence easterly on and along the center line of said brick wall to the west line of that portion of in-lot No. 65 aforesaid now owned by Philip Emich, thence southerly on and along said west line of said Philip Emich's to the north line of said Charles M. Yerk on the north side of said middle third of said lot No. 66, thence on

---

National Exchange Bank v. Cunningham.

---

and along said north line westwardly to the place of beginning, be the same more or less. And said description, in said deed, was and is immediately followed by the words, and all the estate, title and interest of the said National Exchange Bank, either in law, or in equity, of, in and to said premises, together with all the privileges and appurtenances to the same belonging.'

"That afterwards, on the 14th day of January, 1868, the said Grapes sold and conveyed, in fee simple, to the said plaintiff, the same part of the said building and premises last above described, with the same description and like covenants.

"That on May 3, 1869, and again on January 31, 1870, the plaintiff paid to the bank the sum of \$12.50, which said bank demanded of him on account of an alleged higher rate of insurance the said bank had to pay because of the opening for said south hall, in said brick wall, separating the banking room from the rooms conveyed to said Grapes and to the plaintiff.

"That the free and undisturbed use of the said stairway leading from Washington street to second floor of said building, and the opening at the top landing of said stairway in the wall, separating the said parts of said building, owned respectively by the plaintiff and the bank, are necessary for the proper use and enjoyment of that part of said building, so conveyed by said bank to said Grapes, and by said Grapes, to the plaintiff, as constitute the front offices of said portion so sold and conveyed, and that such use and enjoyment of said stairway, and said opening in said wall, is the only means of access to the said offices, on said second floor of the plaintiff's part of said building, and was used with the knowledge of said defendant from the 11th day of January, 1867, until about the time of the commencement of this action.

"That on or about the 1st day of December, 1880, the bank was about to close the opening in said wall, at the entrance of said south hall, in the second story of said building, so as to prevent the use of said stairway to reach the second and third floors of that part of said building so conveyed by said bank to Grapes, and by Grapes to the plaintiff.



---

National Exchange Bank v. Cunningham.

---

“ And the court, from the foregoing conclusions of fact, find, as conclusions of law, that the said stairway, leading from said Washington street to the second floor of said building, and the opening in said wall, at the top landing of said stairway, forming the entrance of said south hall in the second story of said building, are privileges and appurtenances belonging to that part of said building and premises, so conveyed by said bank to said Grapes, and by said Grapes to the plaintiff; and that the plaintiff, his heirs and assigns, have and hold the right to the free and undisputed use and enjoyment of the said stairway leading from Washington street to the second floor of said building, and of the entrance to the said south hall thereof.

“ It is therefore ordered, adjudged and decreed, that the defendant, the National Exchange Bank, of Tiffin, Ohio, and all persons claiming by, through, or under it, be and hereby are perpetually enjoined from closing up the said opening in said wall, at the top landing of said stairway, forming the entrance to the said south hall, in the second story of said building, and from closing up or obstructing the said south hall, or the way leading thereto, in any manner whatever, or doing or permitting to be done, any act whatever to prevent the free and undisturbed use of the said stairway leading from Washington street for that part of said building and premises, so by it conveyed to said Grapes, and by said Grapes to said plaintiff.”

To which findings and conclusions of law, and judgment, the bank excepted, and to obtain the reversal of the judgment prosecutes error to this court.

*N. L. Brewer*, for plaintiff in error.

No brief for defendant in error.

**WILLIAMS, J.** The only question raised upon the record, is whether the facts found by the circuit court are sufficient to warrant the judgment it rendered. The case made by those facts is, in substance, that in the plan and construction of the building erected by the bank, which covered the entire lot owned by it, a stairway, leading from Washington street to the second story of the building, was constructed in the corner

room, now occupied and owned by the bank. At the landing of this stairway, and connected with it, a hall was made, extending across the second floor of part of the premises afterwards conveyed by the bank to Grapes, and by him to the plaintiff, and connecting with the second story of the balance of the premises so conveyed. The rooms on the second story of the premises now owned by the plaintiff, were made into offices, and doors opened into them from the hall. Another stairway was also put in, running from the hall to the third story. The stairway leading from Washington street to the second story, was, and is, the only means provided for access to the hall above, and to the rooms opening into it, and the unobstructed use of that stairway is necessary to their proper use and enjoyment. This was the condition of the premises when the bank sold and conveyed to Grapes, those portions purchased by him, including the hall, and the rooms which open into it; and thereafter, with the knowledge of the bank, he used the stairway as his only means of access to the hall and the rooms, until he sold to the plaintiff. The stairway was so in use when the plaintiff purchased, and he, thereafter continued such use until shortly before the commencement of the action, when the bank threatened to close up the entrance to the hall, and thus prevent the use of the stairway as a means of approach to it, and to the connecting rooms.

The general rule, that easements appurtenant, pass with the grant of the dominant estate, is not controverted; but the principal claim of the plaintiff in error is, that inasmuch as the conveyance was made to Grapes immediately after the completion of the building, and, at that time no use had been made of the stairway as a means of access to the hall and rooms above, the right to such use was not an appurtenance to the premises conveyed, and did not, therefore, pass by the grant. It is evident however, that at the time of the conveyance, the arrangement and construction of the building were such as to plainly indicate, that the stairway must have been intended as a permanent and continuous way of reaching the hall, and the rooms connecting with it, on the second floor. Those rooms were constructed for use, and no

avenue of approach to them was provided, except by that stairway. The bank, in the construction of the building, had thus visibly and obviously made them dependent, for the means of access, and beneficial enjoyment, upon the use of the stairway; and, it must have been apparent to both parties, that, in the condition in which the premises were, at the time of the conveyance, without the use of the stairway, the hall and rooms to which it led, were inaccessible and useless; and it could hardly have been contemplated by either, that immediately thereafter, the grantee should contrive, and adopt some different means, by which he might be enabled to enjoy what he had purchased. The parties are presumed to have contracted, with reference to the condition of the property at the time of the sale, and to have intended, that the grantee should have the means of using the property granted, and therefore, that he should have such rights and privileges in, or over, the premises remaining in the grantor, as might be requisite for that purpose.

It is a well settled doctrine of the law of easements, that where there are no restrictive words in the grant, the conveyance of the land, will pass to the grantee, all those apparent and continuous easements which have been used, and are at the time of the grant used by the owner of the entirety for the benefit of the parcel granted; and also, all that appear to belong to it, as between it, and the property which the vendor retains; and hence, when the owner of an entire estate, makes one part of it visibly dependent for the means of access, upon another, and creates a way for its benefit over the other, and then grants the dependent part, the other part becomes subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee, as accessory to the beneficial use and enjoyment of the land. "It can not be denied," said Pollock, C. B., in *Glave v. Harding*, "that if a man build a house and there is actually a way used, or obviously and manifestly intended to be used, by the occupier of the house, the mere lease of the house would carry with it the right to use the way as forming part of its construction." 2 L. J. (N. S.) C. L. R. 292. And "Where the

---

National Exchange Bank v. Cunningham.

---

shell of an unfinished house was sold, with openings in the walls for the insertion of windows and doors, it was held that the vendor could not, after the sale and conveyance of the unfinished structure, build on his own adjoining land, so as to obstruct the access of light and air to the spaces left for windows, or place obstacles in the way of the exercise of a right-of-way to the apertures intended for doors; and when two separate purchasers buy two unfinished houses from the same vendor, and at the time of the purchase the spaces for windows and doors are marked out, this is a sufficient indication to the purchasers of the rights they are respectively to enjoy, so that they can not subsequently interfere with each other's enjoyment of the windows and doors so marked out and impliedly agreed upon at the time of the sale." Addisor on Torts, (Sixth Ed.), 314; *Janes v. Jenkins*, 34 Md. 1; *Compton v. Richards*, 1 Price, 27. And see *Thompson v. Miner*, 30 Iowa, 386; Washburn on Easements, 91.

So long as the bank continued to own the entire premises, there could, of course, be no easement in favor of one part, or servitude upon another, for, it might make any use it chose, of every part. But when it conveyed the part now owned by the plaintiff, the purchaser took it with all the incidents and benefits which at the time appeared to belong to it, as between it and that part retained by the bank. The stairway being at that time, the means provided by the vendor for access to a part of the premises sold, and the only means of such access then existing, and being then and now, as found by the circuit court, necessary to the proper use and occupation of the premises sold, the right to its use, passed by the conveyance to the purchaser, and the bank can not be allowed now to derogate from its grant, by depriving the plaintiff of that use.

It seems to be supposed by the counsel for plaintiff in error, that the judgment of the circuit court requires the bank to keep the stairway in repair, and rebuild it in case of its destruction by fire or other casualty. If such were the scope of the judgment, the plaintiff in error would have just ground of complaint; for it is undoubtedly the rule, that

unless the owner of the servient estate is bound by covenant or prescription to repair, he is under no obligation to do so. The burden devolves upon the owner of the dominant estate, of making whatever repairs are necessary for his use of the easement. It is said by a learned author that "As a general proposition, whoever has an easement, like a right-of-way for instance, in or over another's premises, is the one to keep it in repair." Washburne on Easements, 730. And by another, that "Every grantee of a right-of-way, to be exercised and enjoyed over or through the land of the grantor, must himself repair the way, if he desires to have it repaired and kept in repair for his use, or if repairs are necessary to prevent the enjoyment of the right becoming an annoyance and nuisance to the owner of the servient tenement, unless the grantor himself has expressly undertaken the performance of that duty." Addison on Torts, 301-302. But it is clear the judgment has no such effect as that supposed. It does no more than enjoin the defendant, and those succeeding to its title, from doing any act, curtailing the plaintiff's enjoyment of the easement

The payment made by the plaintiff to the bank on account of the insurance, is quite unimportant. It appears to have been nothing more than a voluntary contribution, without agreement, or obligation, toward the payment of the increased rate of insurance exacted in consequence of the opening made in the wall, in the construction of the hall referred to, and is not incompatible with the existence of the easement. How it would have affected the rights of the parties, if the payment had been made as a compensation for the use of the stairway, we need not determine.

Upon the facts found by the circuit court, its judgment, we think, is correct and must be affirmed.

*Judgment accordingly.*

## COHOON ET AL. v. KINEON.

*Landlord and tenant—Rental value of premises—Offer to confess judgment—  
Rule of costs in such cases.*

1. Where a party occupies premises as a tenant upon an uncertain tenure, and suit is brought to recover for use and occupation for the time occupied, the rule applicable to the case is: What was the fair rental value of the premises as occupied under all the circumstances of the case? And it is competent for the defendant to prove the rental value for the time so occupied.
2. In such case evidence of the value of the real estate itself is not competent as bearing upon the question of rental value.
3. Where, in an action for the recovery of money, commenced in a justice's court, the defendant, in that court, offers to confess judgment for a given amount, with interest from the accruing of the debt, which is not accepted, and the case is appealed to the court of common pleas, the offer follows the case to that court, and is governed by section 5141 of the Revised Statutes; and if, at the trial the plaintiff does not recover more than was so offered to be confessed, and interest thereon from the date of the offer, he will be liable for the costs of defendant accruing after the offer was made.

(Decided November 19, 1893.)

**ERROR to the Circuit Court of Hamilton County.**

The plaintiff in error and the defendant in error were tenants in common of a parcel of land situate in the City of Cincinnati, which the defendant occupied for six months beginning January 1, 1881. The plaintiffs brought two suits against defendant before a justice of the peace, one to recover \$250.00 for a quarter's rent from January 1, to April 1, and another for a like amount from April 1, to July 1. Both cases were appealed to the Court of Common Pleas of Hamilton County, where they were consolidated, and the consolidated case tried at the November term, 1887, which trial resulted in a verdict and judgment in favor of plaintiffs for \$347.13. Plaintiffs moved for a new trial, which was overruled and judgment was rendered for plaintiffs for amount of verdict. The court rendered judgment against the plaintiffs for a portion of the costs. Plaintiffs prosecuted error to the circuit

court, in which court the judgment below was affirmed. To obtain a reversal of this judgment of affirmance this proceeding in error is prosecuted.

Other facts necessary to an understanding of the points decided are stated in the opinion.

*D. Thew Wright*, for plaintiffs in error.

*Wulsin & Perkins*, for defendant in error.

SPEAR, J. The relation of the parties with respect to the property in question, and the circumstances, showed that, by mutual understanding, the relation of landlord and tenant existed between plaintiffs and defendant. But one question, therefore, was to be determined by the trial, viz.: the amount of recovery for the rent to be paid. The plaintiffs claimed that an agreement existed, between them and defendant, by which defendant undertook to pay rent at the rate of \$1,000 a year. The verdict disposed of that claim, and it is unnecessary to consider it here.

At the trial, the plaintiff sought to prove, as a means of ascertaining the rental value of the premises for the time occupied, the value of the property itself. To this an objection by defendant was sustained by the court, and the evidence excluded. This ruling is alleged as error. We see no error in the ruling. Proof of the value of the fee simple could hardly aid in ascertaining rental value. The converse of the proposition might be true; indeed would be. But it is matter of common observation that many tracts of real estate of great value have no actual rental value. The evidence would have been misleading, and was, we think, properly excluded.

In cross-examination defendants counsel sought to show, by a witness called by plaintiff to prove rental value of the property for a year, what it was worth for three months only. Plaintiff's objection was overruled and the evidence admitted. This is assigned as error. The rental value for three months was one of the matters at issue, and hence was a proper subject of proof. Besides, the questions were legitimate as cross-examination. For the same reason the defendant was prop-

erly permitted to give evidence in chief of the rental value of the premises for three months.

We think the true rule applicable to the case by which the defendant's liability was to be ascertained, was: What was the fair rental value of the premises as occupied by the defendant, for each of the two quarters which he occupied them, under all the circumstances of the case. This rule the trial judge recognized and enforced. His instructions to the jury were clear and impartial, and we think, as favorable to the plaintiffs as the law of the case would warrant.

Divers other errors are assigned as occurring at the trial. We have examined the record with respect to all these alleged errors, and are satisfied that no error is apparent on the record prejudicial to the plaintiffs.

In the justice's court, before the trial, the defendant offered in one case to allow judgment to be taken against him for \$125.00, with interest from April 1, 1881, (the end of the first quarter), and the costs then made; and in the other case for a like amount, with interest from July 1, 1881, (the end of the second quarter), with costs, each of which offers plaintiffs in open court refused to accept. In rendering judgment, the court of common pleas ordered plaintiffs to pay the costs of defendant (save certain costs which had been adjudged by higher courts) accruing after the making of the offers. This is assigned as error. The claim is that the offers to confess were governed by section 6581 of the Revised Statutes. That section provides that if a defendant, any time before trial, make an offer in writing, to allow judgment to be taken against him for a specified sum, the plaintiff may then have judgment therefor, with the costs then accrued; but if he do not accept the offer before trial, and fail to recover a sum greater than the offer, he cannot recover costs accrued after the offer, but costs must be adjudged against him. This section is part of the justice's code, and applies to actions pending before a justice of the peace.

The general provision on the subject was enacted as section 498 of the Code of Procedure, which regulated practice in courts of record. It is now section 5141, Revised Statutes,



and provides that the defendant in an action for the recovery of money may offer in court to confess judgment, whereupon if the plaintiff refuse to accept and at the trial does not recover more than was so offered, and the interest thereon from the date of the offer, the plaintiff shall pay all the costs of defendant incurred after the offer was made.

These actions had been removed from the justice's court by appeal to the court of common pleas, and were there subject to the general rules of practice of that court. This is the spirit of section 6587 of the Revised Statutes, which is that "The plaintiff in the court below shall be plaintiff in the court of common pleas; and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in the said court." Conformably with this provision pleadings are required to be filed, the jury selected, and the trial conducted and judgment rendered as in other suits for money there pending. Why should not the rule of the statute as to costs also apply? True, the offers were made in the justice's court, and had the cases terminated there, the matter of costs would have been determined by the provision of section 6581. But the offers to confess judgment were carried with the other proceedings by the appeal to the common pleas, and the defendant had the rights thus given until the cases should be finally disposed of. That this section applies to cases like the one at bar, after appeal to the common pleas, was distinctly held by Day, J., in his opinion in *Courtright v. Stagers*, 15 Ohio St. 511. This holding seems to us well grounded in reason, and we are content to follow it in determining the question here. By force of the section, unless the plaintiffs should recover more than the sum offered, and interest from the date of the offer, they were liable for the costs of the defendant after the offer. Their recovery was a little less than that sum. We think the court of common pleas properly adjudged defendant's costs accrued after the offers against the plaintiffs.

This construction works out justice between the parties. Had the plaintiffs accepted the offers, they would have had, adding interest, as much money as the verdict entitled them to. The statute is intended to impose the expense of litigation upon the party who wrongfully persists in continuing it. Its purpose is to discourage needless contention by placing on the litigious party the risk of having his final recovery reduced by a liability for his antagonist's costs. The litigation in this case proceeded to determine whether the plaintiffs were entitled to recover a judgment for a greater sum than the amounts offered. The result showed that they were not; that beyond that amount the plaintiffs' claim was groundless, and in equity, and upon the reason of the statute, plaintiffs should pay the costs made necessary by so unjustifiably prolonging the litigation.

Another view of the case leads to the same result. The instructions of the court required the jury to ascertain from the evidence the amount due from the defendant as rent for each quarter, and then to the amount found for the first quarter add interest from April 1, 1881, to the first day of the term, and also ascertain the amount of rent due for the second quarter, and to that add interest from July 1, 1881, to the first day of the term, and add all together, and make their verdict for the gross sum. It must be presumed that the jury followed this direction. It is not unreasonable to construe the "recovery" referred to in the statute as the recovery upon the cause of action, in this case for rent, the interest being a mere incident. That recovery by the verdict was a sum a trifle less than the sums offered. So that, upon this view, the plaintiffs not having recovered a sum greater than the offers, were liable for defendant's costs after the offers were made.

*Judgment affirmed.*

## BOARD OF EDUCATION v. BOARD OF EDUCATION.

*Statutes—Construction of—Public school property—Title to.*

1. General words used in one section of a statute may be restrained to particular subjects, where the letter of the words would make it impracticable to accomplish a special object authorized by another section of the same statute.
2. Public school property, real or personal, that has been appropriated and set apart by a township board of education for the purpose of a public school of a higher grade than primary, for the benefit of the youth of the whole township, does not pass to or vest in the board of education of a separate school district that may be afterwards organized out of the territory within which the property happens to be situated, although the property falls within the letter of section 3972 Rev. Stats., which is the section of the school law relating to the subject.

(Decided November 19, 1889.)

## ERROR to the Circuit Court of Carroll County.

This action was brought by the plaintiff in error, in the Court of Common Pleas of Carroll County, to recover from the defendant in error possession of a school house and the lot of land upon which it stands. The pleadings, as made up, put in issue both the title and the right of possession of the plaintiff to the property in dispute. The action was tried by the court, without the intervention of a jury, and resulted in a judgment for the defendant. The plaintiff embodied the proceedings at the trial in a bill of exceptions and took the case to the circuit court on error, where the judgment of the court of common pleas was affirmed. Thereupon this proceeding was brought to reverse both judgments.

*Fimple, Holder & DeFord*, for plaintiff in error.

*Hays & Black, McCoy & Taylor*, and *George E. Coleman*, for defendant in error.

BRADBURY, J. There was no dispute about the essential facts of the case. It appears from the bill of exceptions that, prior to May 19, 1885, Monroe Township, Carroll County,

constituted a single school district, composed of a number of sub-districts of which the village of Dell Roy, known as sub-district No. 5, was one; that in the year 1882, the plaintiff bought the lot and advertised for bids to construct the house in dispute; that at a meeting of the board of education, held September 18, of that year, the bids were opened and the board at the same meeting, by resolution, established for the township a school of higher grade than primary, and appropriated and set apart for that purpose this house, when it should be built, together with the lot and all its appurtenances; that during the ensuing winter it caused such school of higher grade than primary to be taught therein; that afterwards the board rejected a resolution introduced to transfer this property to sub-district No. 5, for a sub-district school house, but did from time to time, by special resolutions, permit sub-district No. 5 to use said house for limited periods of time; that on May 19, 1885, the territory composing sub-district No. 5 was organized into a village, or independent, school district, which is the defendant in error; that at the time of its organization into a village district there were within the territorial limits two school houses besides the one in controversy; and that upon completing its organization the defendant took possession of the latter house, as well as of the two others, and has retained such possession ever since.

Counsel for plaintiff in error claim that, upon the undisputed facts as above recited, the judgments of the common pleas and circuit courts should have been for their client, while, on the other hand, counsel for the defendant contend, not only that the judgment of the lower courts upon the facts, were correct, but that this court is not completely advised concerning the undisputed facts, because the bill of exceptions does not contain all the evidence that was before the court of common pleas. An examination of the bill of exceptions will disclose that the contention of defendant's counsel, that it does not contain all the evidence, is incorrect. The only omission claimed is, that the bill of exceptions does not contain a report of the plaintiff made August 31, 1883. This report was offered by the defendant, evidently, to show that it con-

tained no reference to a high school, and the record discloses that the plaintiff then admitted it contained no such reference. This was to obviate the necessity of introducing in evidence the report; and as the record does not contain any statement that it was in fact admitted, the inference is that it was not. But were there no such inference, yet as the bill of exceptions states that it contains "all the evidence introduced by either party," it would be conclusive of the matter, unless upon its face some omission affirmatively appeared, and the circumstances alluded to above fall far short of establishing such omission, even if the correctness of the inference drawn by the court from them should be questioned.

The bill of exceptions, then, being complete, did the undisputed facts which it discloses, entitle the plaintiff to a judgment? The school house in dispute was built by the township board to be used for teaching a school of higher grade than primary, for the benefit of the youth of the whole township. It was, presumably, located at a point most convenient for that purpose, and which happened to fall within the territory afterwards organized into a separate village district, but was not designed for the benefit of that territory alone; nor was it ever afterwards set apart by any action of the township board for the use of that territory. On the contrary, not only was a resolution to that effect defeated, but resolutions granting its use to the sub-district temporarily were couched in the most cautious and exact terms, to avoid, evidently, any inference that the township board intended to yield up any right thereto, beyond that expressly granted.

There being, then, nothing in the bill of exceptions from which it can be inferred that the township board ever renounced its general control over, or transferred to the defendant its title to, the property, this must have been accomplished, if at all, by operation of law, from the circumstance that it was situated within the territorial limits of the defendant when that territory was organized into a village district. It is claimed that section 3972, of the Revised Statutes, has this effect. That section reads as follows: "All property, real or personal, which has heretofore vested in and is now held by

any board of education, or the council of any municipal corporation, for the use of public or common schools in any district, is hereby vested in the board of education provided for in this title, having under this title jurisdiction and control of the schools in such district."

That the school property in dispute in this action is embraced by the terms of this statute is clear; it is property "held \* \* \* for the use of public or common schools," and it is situated in the district, the schools of which are under the "jurisdiction and control" of the defendant board, so that, unless the general words of the statute can be restrained or limited by ascertained principles of construction, they would vest the title of the property in the defendant. These principles require us to examine the whole law upon the subject, and learn, if possible, the general object of the law maker, and give to any particular section a meaning in harmony with this general object, if the language will bear it; or, to forbear to give it a meaning that will defeat some special purpose of the legislature, clearly discernible in some other portion of the entire enactment.

The purpose of the legislature, in enacting the school law of 1873, was to provide a harmonious system of public schools for the education of the youth of the state, in both the primary and higher branches of learning. Township boards of education were authorized to create and maintain, for the benefit of the whole township, schools of a higher grade than primary. For this purpose they have power to procure grounds at points most accessible and convenient, erect suitable houses and provide appropriate instruments and appliances. Can it be reasonably supposed that the legislature contemplated that, after a township board had, perhaps, expended a large sum of money in purchasing a site convenient for the whole township, erected a building in every way suitable and commodious for the youth of the township who might be desirous of higher education, and provided instruments appropriate to the object in view, their hopes could be defeated, and house, grounds and appliances wrested from them, by the inhabitants of the territory in which the building was situated organizing

themselves into a separate school district? This result could be brought about if the general language of section 3972 can not be restrained by construction. That they should take with them and hold in their new and independent state, all the public school property which was in their territory and had before been used by them alone, is entirely reasonable. The other portions of sub-districts of the township had no practical interest in or beneficial use of it before the separation: Each remaining sub-district had similar property in its limits, subject to its particular use, and therefore suffered no injury by the transfer of the title and control to the same persons, though differently organized, who had before enjoyed its sole use. Here, then, is property that is embraced within the general terms of section 3972, and which, it is reasonable to suppose, was intended to be transferred to the separate district upon its organization. To hold that grounds, buildings and appliances, designed and intended to secure to the youth of the whole township an opportunity for education in the higher branches of learning could be thus transferred, would defeat a legislative purpose clearly discernible upon the face of the law; for township boards could hardly be expected to provide the necessary means to accomplish it, where the requisite property should be held by so uncertain a tenure.

The rule that general words used in a statute should be limited to the objects to which it is apparent the legislature intended to apply them, is established upon the authority of the text books and of almost innumerable adjudicated cases. Hardcastle, in an ably written and recent treatise on the construction of statutes, reviews the English cases on the subject from a very early period, and on page 75 says: "The question whether, when the legislature have used general words in a statute \* \* \* those words are to receive any (and, if so, what) limitation, is one which may sometimes be answered by considering whether the intention of the legislature on this point can be gathered from other parts of the statute." And he cites from *Stradling v. Morgan*, Plowden, 204, the following language with approval: "The judges of the law, in all times past, have so far pursued the intent of the makers

of statutes, that they have expounded acts which are *general in words* to be but particular where the intent was particular; \* \* \* and those statutes which comprehended all things in the letter they have expounded to extend but to *some things.*"

This principle is peculiarly apposite to the case before us; the words of the statute embrace and would transfer, if not limited, all the school property within the territorial limits of the defendant to its control and use; but there can be gathered from the statute a legislative intent incompatible with the unlimited meaning these general words convey;—an intention to empower the township board of education to establish a township school of a higher grade than primary, and to acquire and hold property for that purpose, though the territory within which the property may be located should organize itself into a separate school district.

This rule of construction finds support in the decisions of nearly every state of the Union, but it is only necessary to notice some of the cases in our own state. The first case in Ohio is that of *Burgett v. Burgett*, 1 Ohio, 469, where the court construe the statute making "every gift, grant, or conveyance of lands, \* \* \* to defraud creditors, *utterly void and of no effect.*" These words are general, and if not limited by construction, would make such conveyance void as to all persons; but the court limited it to persons whom it was the intention of the legislature to protect, that is to creditors and subsequent purchasers. On page 480, Judge Burnet in delivering the opinion of the court says: "The intention of the law makers may be collected from the cause or necessity of the act, and statutes are sometimes construed contrary to the literal meaning of the words. It has been decided, that a thing within the letter, was not within the statute, unless within its intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter." The same principle was adopted in *Whitney et al. v. Webb et al.*, 10 Ohio 513 in construing the words "beyond the seas" in the statute of limitations. See also *Slater et al. v. Cave*, 3 Ohio St. 80. It is unnecessary to refer to all the cases in this state in sup-



port of this principle of construction. There is, however, one other case to which I desire to refer; it is that of *Sawyer v. The State ex rel. Horr*, 45 Ohio St. 343. In that case the court was required to construe the statute (84 Ohio L. 240) creating a new judicial circuit and providing for three additional circuit judges, which it provided should be elected "on the first Tuesday of November next." The court upon a consideration of the whole statute, in connection with the general election law of the state, rejected the language quoted and held that the legislature must have intended the election to be held on the "first Tuesday after the first Monday of November." It was contended in that case that the language was too plain to admit of such construction, but an examination of the opinion of Owen, C. J., will show the holding of the court to be in line with the best considered cases.

We hold, therefore, that by the established principles of construction, the general words of sec. 3972 Rev. Stats., must be limited so as not to vest in a separate school district, carved out of a township, property that had been acquired and was held for the benefit of the whole township.

*The judgment of the circuit court, and that of the common pleas, is reversed, and a judgment for the plaintiff upon the undisputed facts.*

---

JACOBS v. MITCHELL ET AL.

1. The time of payment, as fixed by a note, may be controlled by a separate written agreement made and entered into by the parties at the time of the execution of the note.
2. A made and delivered to B his promissory note for the payment of a certain sum of money thirteen months after date. They also, concurrently therewith, made and entered into a separate written agreement, that the note should not become due and payable until C (for whom B was acting as agent) should sell for A a certain number of bushels of oats at a certain price.

---

Jacobs v. Mitchell *et al.*

---

*Held:* That an action on the note cannot be maintained until the terms of the concurrent written agreement have been complied with: and, further, that such is the rule in an action by a holder, who acquired his title with notice of the agreement.

3. The maker, when sued upon a note, may, as a defense, show that it is founded upon an illegal agreement, although it appears that he is *in pari delicto*, where the suit is by a party to the agreement, or by one having acquired his title with notice.

(Decided December 3, 1889.)

### ERROR to the Circuit Court of Allen County.

The suit below was brought by the holder against the maker of a promissory note, the holder averring that he became the owner of it for a valuable consideration before it became due. The note is as follows:

"\$400.

December 9, 1884.

Thirteen months after date I promise to pay to T. J. McElroy or bearer, four hundred dollars, value received, 6 per cent. interest.

J. W. JACOBS."

The questions arise upon a demurrer to the answer, which is as follows:

*First defense.*—The said defendant, for amended answer to plaintiff's petition says, that concurrent with the execution and delivery of the note upon which this action is brought, the payee thereof, one T. J. McElroy, representing himself to be the agent of the "Crawford, Henry & Williams County Bohemian Oats Association," executed and delivered to said defendant a written agreement, said T. J. McElroy representing to said defendant that he, the said McElroy, had full authority to bind said company as its agent.

It is expressly stated in said written agreement, executed and delivered by said McElroy to said defendant, that the note given by said defendant to said T. J. McElroy should not be due and payable, and the amount therein named be called for, until said Bohemian Oats Association should sell for said J.

W. Jacobs eighty bushels of Bohemian oats at ten dollars per bushel.

This said agreement was taken by said J. W. Jacobs as a part consideration for the amount named in said note, which said Jacobs agreed to pay upon fulfillment of said written agreement. The only other consideration ever received by said Jacobs for said note was 40 bushels of oats, which were not worth more than 40 cents per bushel when received. The terms of said written agreement have never been complied with, either by said T. J. McElroy, or the said Oats Association.

The plaintiffs, before their alleged purchase of said note, knew that said written agreement existed, and had full notice of the force and intention thereof, and defendant denies that plaintiffs purchased said note before maturity.

*Second defense.*—Said defendant says that the said note upon which this action was brought, was obtained from said defendant by one T. J. McElroy (payee) by fraud, and was disposed of by said McElroy fraudulently, and that said fraud consisted of this, to-wit:

The said T. J. McElroy, on or about the 9th day of December, 1884, represented to said defendant that he was the agent of the "Crawford, Henry & Williams County Bohemian Oats Association," and for the purpose of defrauding said defendant, and to obtain his signature to a promissory note, agreed to deliver to said defendant 40 bushels of so-called Bohemian oats, representing falsely that said oats were of an extraordinary quality and value, when in fact the said oats were of no more value than oats ordinarily raised by farmers; and for the further purpose of defrauding said defendant, said T. J. McElroy represented and agreed on the part of said company, that if said defendant would take said 40 bushels of oats, and deliver to said McElroy his promissory note for the sum of \$400, that he, the said McElroy, would hold said note and not dispose of it until after the said Bohemian Oats Company should sell for said Jacobs 80 bushels of oats out of the next year's crop at \$10 per bushel, and that said note would then, and not until then, have to be paid by said Jacobs.

Said agreement by said McElroy on the part of said company was in the form of a partly written and partly printed bond, and was delivered by said McElroy to said defendant concurrent with the delivery of said note, who relying on the said false and fraudulent statements of said McElroy, and believing that they were true (when in fact said false representations were made with intent to defraud said defendant by said McElroy), did sign said note, and deliver the same to said McElroy, who, contrary to his said agreement and for the purpose of defrauding said defendant, disposed of said note so that defendant might not be able to make any defense thereto. Said agreement by said McElroy to sell, or cause to be sold by said company, said eighty bushels of oats has not been performed, although the time has long since expired when said oats were to be sold, and said Jacobs retained 80 bushels of said oats, and still retains said oats, for the purpose of performing said contract on his part.

The plaintiffs, defendant avers, took said note with knowledge of said contract between said McElroy and said defendant; and defendant further avers that plaintiff is not a *bona fide* holder of said note.

Wherefore defendant asks that he may go hence with his costs.

The demurrer was sustained and judgment rendered for the plaintiff; and, on proceedings in error, the judgment was affirmed by the circuit court.

*James O. Ohler*, for plaintiff in error.

This case stands as if between the maker and payee of the note, by the averments of the answer. There was at least a *partial* failure of consideration. Edwards on Notes and Bills, 3 Ed., sec. 167.

The note and contract constitute one and the same contract, though on different papers. *Carr v. Hays*, Cent. Law Jour., vol. 25, p. 32; *Shirley v. Welsh*, 2 C. C. R. 401-404; *Kitchen v. Loudenback*, 3 C. C. R. 228; *Davis v. Seely*, vol. 20 Law Bull. 215.

*Frank E. Mead*, for defendant in error.

In order that the several agreements shall be construed together as forming one agreement, it must be between the same identical parties; and where, as in this case, an ordinary promissory note, for the unconditional payment of money, at a given time, for a definite amount, was given, it cannot be explained or qualified by any other written instrument, even as between the original parties, unless made at the same time and executed by the same identical parties who executed the note; nor could parol testimony be admitted to qualify the express terms of the note. *Webb v. Spicer*, 13 Q. B. 886, 899; 66 Eng. C. L. 898; *Harley v. Welb*, 2 C. C. R. 57; 17 Law Bull. 249.

MINSHALL, C. J. We think the court erred in sustaining the demurrer to the answer of the defendant. The first defense is based upon the non-performance of a contemporaneous written agreement, made and entered into by the parties in regard to the note, and of which, it is averred, the plaintiff had notice when he became the holder of it. He then stands in the shoes of the original payee, McElroy. Although the note stipulates that it is payable thirteen months after date, still this must be controlled, as between parties and holders with notice, by the written agreement, that it is not to become due and payable until the association has sold for the maker 80 bushels of oats at the price named. 2 Parsons on Notes and Bills, 144, 534. It is not necessary that an answer should be returned to the question, why the parties should have subjected the absolute stipulation of the note as to the time of payment, to the provisional terms of the written agreement. It is sufficient to say that they have seen fit to do so, and the agreement is binding on the holder. The effect of it is to give the maker the right to pay the note according to its terms, or to decline to do so until the terms of the written agreement are complied with, if, in his judgment, it would be more prudent to do so. This branch of the answer, then, states a sufficient defense to the action—non-performance of the agreement.

---

Jacobs v. Mitchell et al.

---

The case of *Webb v. Spicer*, 66 Eng. Com. Law, 894, 898, is, when rightly considered, not in conflict with this holding. The point of that decision was, that the written agreement was not between the parties to the note. Here, it is. The fact that the suit is not between the *original* parties to the note and agreement, does not affect the question, since the plaintiff acquired his title with notice, and stands in the shoes of the original payee

The second defense is based upon the alleged fraud of McElroy in obtaining the defendant's signature to the note by fraudulent representations as to the value of the oats. As it is also averred that the plaintiff took the note with knowledge of the fraud, the facts averred certainly constitute a defense, and the demurrer should have been overruled.

Neither of these defenses show that the maker was a party to any contemplated fraud upon the public. If the averments be true, and they are admitted by the demurrer, he was simply deceived into the belief that money could honestly be made out of the introduction of a new variety of oats, and the assumption that he was a party to any contemplated fraud on others at the time he executed the note, is inconsistent with the averments of his answer.

But if the assumption were true, still the illegal character of the consideration might be plead as a defense by the maker to an action on the note by the other party or any holder of it with notice. Complicity in a wrong may defeat a party who, by action, seeks to enforce an executory contract based upon it, or to obtain affirmative relief against the contract, as by injunction or cancellation; but such complicity does not preclude a defendant from pleading the facts as a defense, although he may be *in pari delicto*. *Roll v. Raguet*, 4 Ohio, 400; *McQuade v. Rosecrans*, 36 Ohio St. 442; *Kahn v. Walton*, 46 Ohio St. 195, 209.

*Judgment reversed, and cause remanded to the court of common pleas, with directions to overrule the demurrer, and for further proceedings.*

## GORDON v. THE STATE.

ERROR to the Court of Common Pleas of Perry County.

## SANTORO v. THE STATE.

ERROR to the Circuit Court of Portage County.

*Local Option.*

The act entitled "An act to further provide against the evils resulting from the traffic in intoxicating liquors, by local option in any township in the State of Ohio," passed March 3, 1888, is not in conflict with the constitution, and is a valid law.

(Decided December 3, 1889.)

The plaintiffs in error, Basil A. Gordon and Dominico Santoro, were severally indicted under the act entitled, "An act to further provide against the evils resulting from the traffic in intoxicating liquors, by local option in any township in the state of Ohio," passed March 3, 1888.

That act provides as follows:

"SECTION 1. Be it enacted, etc., that whenever one-fourth of the qualified electors of any township, residing outside of any municipal incorporation, shall petition the trustees therefor for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such township, and without the limits of any such municipal incorporation, such trustees shall order a special election for the purpose, to be held at the usual place or places for holding township elections; and notice shall be given and the election conducted in all respects as provided by law for the election of township trustees; and only those electors shall be entitled to vote at such election who reside within the township and without the limits of any such municipal incorporation. A record of the result of such election shall be kept by the township clerk in the record of the proceedings of township trustees; and in all trials for violation of this act, the original entry of said record, or a copy thereof certified by the township clerk, provided that it shows or states that a major-

46	607
47	488
48	607
161	006
46	607
63	402
46	607
66	586

---

Gordon v. The State—Santoro v. The State.

---

ity was against the sale, shall be *prima facie* evidence that the selling, furnishing, giving away or keeping a place, if it took place from and after thirty days from the day of the holding of said election, was then and there prohibited and unlawful."

"SECTION 2. Persons voting at any election held under the provisions of this act, who are opposed to the sale of intoxicating liquors as a beverage, shall have written or printed on their ballots, "Against the sale;" and those who favor the sale of such liquors shall have written or printed on their ballots, "For the sale;" and if a majority of the votes cast at such election shall be "Against the sale," then from and after thirty days from the day of the holding of said election, it shall be unlawful for any person within the limits of such township and without the limits of such municipal corporation to sell, furnish or give away any intoxicating liquors to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished; and whoever sells, furnishes or gives away any intoxicating liquors as a beverage, or keeps a place where such liquors are kept for sale, given away or furnished, shall be fined not more than five hundred dollars, nor less than fifty dollars, and imprisoned in the county jail not exceeding six months; but nothing in this section shall be construed so as to prevent the manufacture and sale of cider, or sale of wine manufactured from the pure juice of the grape, cultivated in this state, nor to prevent a legally registered druggist from selling or furnishing pure wines or liquors for exclusively known medicinal, art, scientific, mechanical, or sacramental purposes; but this provision shall not be construed to authorize the keeping of a place where wine, cider or other intoxicating liquors are sold, kept for sale, furnished or given away as a beverage."

"SECTION 3. In indictments for violations of this act, it shall not be necessary to set forth the facts showing that the township has availed itself of the provisions of this act, but it shall be sufficient to plead simply that said selling, furnishing, giving away or keeping a place was then and there prohibited and unlawful."



SECTION 4 provides for the return of a ratable proportion of the special liquor tax to the dealer, where the majority of the votes cast at such election shall be against the sale. Section 5 provides for biennial elections under the act. Section 6 provides what shall be deemed a sufficient entry and record of the result of an election under the act. Section 7 provides for the disposition of fines.

“SECTION 8. This act shall take effect and be in force from and after its passage.”

In the case of *Gordon v. The State*, the indictment charged that Basil A. Gordon on the 22d day of December, 1888, in the township of Pleasant, in the county of Perry, unlawfully sold intoxicating liquors, other than cider, or wine manufactured from the pure juice of the grape cultivated in this state, as a beverage, to divers persons whose names to the jurors were unknown, said selling being then and there prohibited and unlawful, and said selling not being for exclusively known medicinal, art, scientific, mechanical, or sacramental purposes. Gordon moved to quash the indictment for alleged defects in the form of the indictment, and in the manner in which the offense was charged, which motion being overruled and the ruling excepted to, he demurred to the indictment, on the ground, that the facts therein stated did not constitute an offense against the laws of the state, and that the above entitled act of March 3, 1888, is unconstitutional. The demurrer was overruled and exception taken, whereupon, Gordon was put upon trial. The jury returned a verdict of guilty, and he was sentenced to pay fine of fifty dollars and costs of prosecution, and to be imprisoned for the term of fifteen days. The petition in error filed in this court prays, that the above entitled act may be declared unconstitutional, and that the judgment of the court of common may be reversed.

In the case of *Santoro v. The State*, the indictment charged, that Dominico Santoro, on or about the 13th day of December, 1888, within Mantua township, in the county of Portage, then and there not being a legally registered druggist, unlawfully sold certain intoxicating liquors, to-wit: whisky, to one Frank

Kriser, which selling was then and there prohibited and unlawful. Santoro demurred to the indictment. The demurrer was overruled and exception noted. He was then put upon trial; the jury returned a verdict of guilty; and he was sentenced to pay a fine and to be imprisoned. The circuit court affirmed the judgment of the court of common pleas, and it is now sought to reverse the judgment of the circuit court, on the ground, that the above recited act of March 3, 1888, is in contravention of the constitution of this state and therefore void.

*Ferguson & Johnston, James D. Retallic, and Matthews & Greeve, for plaintiff in error, in the case of Gordon v. The State.*

*Brief of Ferguson & Johnston and James D. Retallic.*

The act in question is in contravention of the constitution of the state, and, therefore, unconstitutional and void.

*First*—It is an act of a general nature and has not a uniform operation throughout the state.

*Second*—It is a delegation of legislative power to the people.

*Third*—It authorizes the people to suspend or repeal a law, to-wit: The "Dow law," and enact in its stead another.

*Fourth*—It seeks to prohibit the liquor traffic, when the only power the legislature has, is to regulate it.

Section 1 of Article II is substantially the same as in the constitution of 1802, while section 26 of the same article is not to be found in that constitution. We here have one of the strongest arguments to maintain our position on the first and second grounds. It is a well-known rule in the construction, either of a statute or constitutional provision, that we are to look to the condition of things prior to its enactment or adoption, and what was intended by it to remedy or prevent. The origin of section 26, Art. II is perfectly well known. *Case v. Dillon*, 2 Ohio St. 617. Every criminal statute of the state is a law of a general nature, and when a law attaches a penalty to the doing of a given act in one township or county of the state, which if done in some other township or county of the state is lawful, it is not uniform in its operation throughout the state, and is repugnant to the first clause of section 26,

above quoted. Operation is defined in the case of *Geebick v. State*, 5 Iowa, 491. See also, *Maize v. State*, 4 Ind. 342; *Kelley v. State*, 6 Ohio St. 269; *Ex parte Van Hagan*, 25 Ohio St. 426. This doctrine is also approved in *Ex parte Falk*, 42 Ohio St. 641; *C., W. & Z. Ry. Co. v. Commissioners*, 1 Ohio St. 77.

The difference between villages, and counties and townships is very apparent; the latter have no legislative power and the legislature has not even implied authority to grant them any; it is, in fact, prohibited from so doing. 16 Ohio St. 55; Art. X, sec. 7, and Art. XIII, sec. 6, of the constitution.

By the act known as the "Dow law," the traffic in intoxicating liquors is regulated and taxed; they may be lawfully sold in the mode described by that act. The act in question in this case submits to the voters of any township to decide whether the "Dow law" shall be repealed or suspended in such township, and a criminal prohibition takes its place. *State v. Weir*, 33 Iowa, 134.

This act is an inanimate thing—a dead letter. If one-fourth of the electors should not petition, or having petitioned, a majority within the particular township should vote "for the sale" biennially when submitted, the act as a statute has no existence. At best, it is but an invitation or proposition to the voters of the several townships to enact within their township a penal statute in violation of sec. 26, Art. II, and at the same time suspend or repeal another statute, to-wit: The "Dow law" in violation of sec. 18, Art. 1. And it will further be remembered that our constitution grants to the legislature the power to regulate, not to destroy, the traffic in intoxicating liquors. Under sec. 18, of schedule above quoted, it may *provide against the evils* resulting from the traffic, but not to destroy the traffic itself. This question was decided in *Miller and Gibson v. The State*, 3 Ohio St. 476.

Having so far examined this act in the light of our own constitution and decisions, except a few references, we will call the attention of the court to some of the decisions of other

states. And before proceeding to them we desire to say, that we are not aware at this time of any constitution of any state having all of the above provisions found in ours, and it will also be important here to note, that our constitution prohibits the licensing of the liquor traffic, and also the prohibition of it; and every state where local option laws have been upheld *may license or prohibit the traffic*; and we desire here also to say, that in nearly every instance the enactment which was sustained made it unlawful to sell liquors without a license, and affixed a penalty; and the only question submitted to vote was whether a license might issue or not, and every well considered case, upholding this class of legislation, condemned, as unconstitutional, the class of legislation to which the act in question in this case belongs. *Lammert v. Lidwell*, 62 Mo. 188; *State v. Morris*, 36 N. J. 72; *Village v. Howell*, 70 N. Y. 291; *Groesch v. State*, 42 Ind. 547; *Lock's Appeal*, 72 Pa. St. 491; *State v. Wilcox*, 42 Conn. 364; *Boyd v. Bryant*, 35 Ark. 69; *Fell v. State*, 42 Md. 71; *Exparte Wall*, 48 Cal. 279; *Rice v. Foster*, 4 Harr. (Del.) 479; *Parker v. Commonwealth*, 6 Pa. St. 507; *Barto v. Himrod*, 8 N. Y. 483; *Cooley on Const. Lim.* 5 Ed. 139, and cases there cited.

We claim said act is void upon the following additional grounds:

*Fifth.*—There is no mode provided by which the parties can ascertain whether the names on the petition are genuine, or whether they are voters or constitute one-tenth of the voters of the township, and there is no basis upon which to determine the number of petitioners.

*Sixth.*—There is no provision that the petition shall be filed or preserved.

*Seventh.*—A record of the result of such election is all that is required to be kept, and it is only made *prima facie* evidence of the truth of the matter therein stated; and whether or not the act was in force would be a question of fact in every case, leaving every step taken and act done under it open to contest and interminable litigation. Statutes of such importance can not lawfully be left in such uncertainty.

In support of these three propositions we refer the court to the case entitled "*In re Hauch*," decided by the Supreme Court of Michigan, May 18, 1888, reported in the Northwestern Reporter, Vol. 38, No. 3, page 269. The statute there being on these points, in substance, the same as our act.

The court erred in overruling the motion to quash the indictment.

The indictment does not properly or sufficiently allege a sale. The allegation that he sold to divers persons to the jurors unknown, if otherwise good, alleges a duplicity of offenses. Divers in its legal acceptation, means different, and the allegation stands as though it alleged he sold to different persons. The pleading we have here does not sufficiently inform the accused party of the nature and cause of the accusation. It is too uncertain and affords him no opportunity to make a defense against the omnibus charge. We think on this ground also that the indictment is bad.

*I. T. Siddall*, for plaintiff in error, Santoro.

1. This proceeding in error is for the sole purpose of determining the constitutionality of the act of March 3, A. D. 1888, known as the "Township Local Option Act."

Article II, sec. 1, of the constitution, locates the authority to legislate in the general assembly. The general assembly can not delegate its authority, nor avoid the responsibility of law makers, by thrusting it back upon the people. Judge Ranney announced this principle in *R. R. Co. v. Comm'rs*, 1 Ohio St. 87. See also, *Santo v. State*, 2 Ia. 203; *Geebrick v. State*, 5 Ia. 492; *Meshmeier v. State*, 11 Ind. 482; *Thorne v. Cramer*, 15 Barb. 112; *Bradley v. Baxter*, 15 Barb. 123; *Bank v. Brown*, 26 N. Y. 472; *State v. Copeland*, 3 R. I. 33; *Parker v. Com.*, 6 Pa. St. 507; *State v. Beneke*, 9 Ia. 203; *State v. Frame*, 39 Ohio St. 407-8.

The legislature has no power to make the operation or enforcement of a law dependent upon the will of the people. *Ex Parte, Wall*, 48 Cal. 279; *State v. Weir*, 33 Ia. 134; *Maize v. State*, 4 Ind. 342; *Kelly v. State*, 6 Ohio St. 272; *Pople v.*

---

Gordon v. The State—Santoro v. The State.

---

*Collins*, 3 Mich. 416; *Barto v. Himrod*, 8 N. Y. 492; *Mesheimer v. State*, 11 Ind. 482; *Lammert v. Lidwell*, 62 Mo. 188.

The constitutionality of a statute depends upon its operation, and not upon the form it may be made to assume. *State v. Hipp*, 38 Ohio St. 199; *State v. Frame*, 39 Ohio St. 412; *Butzman v. Whitbeck*, 42 Ohio St. 223. An act violating the intent is as much within the purview and effect of a prohibition as if within the letter. *District Court Case*, 34 Ohio St. 441.

To have a uniform operation, if enforced at all, it must be wherever the right hand of the law can reach to enforce it, and therefore in full force in every part of the state. *Ex parte Van Hagan*, 25 Ohio St. 431; *Kelley v. State*, 6 Ohio St. 269; *Durkee v. Jonesville*, 26 Wis. 697; *McGregor v. Bayliss*, 19 Ia. 43; N. J. L. 40, page 1; *People v. Supervisors*, 43 N. Y. 10; *Robinson v. Perry*, 17 Kans. 248; 68 N. Y. 381.

All laws, making an act a crime against the state, are laws of a general nature. *Ex parte Van Hagan*, 25 Ohio St. 431; *Kelley v. State*, 6 Ohio St. 269; 11 Ind. 482; 4 Ind. 342, and other cases cited above; *State v. Winch*, 45 Ohio St. 663.

Judge Thurman announced the evils intended to be overcome by this provision of the constitution, in *Cass v. Dillon*, 2 Ohio St. 617; approved, 25 Ohio St. 432; *McGill v. State*, 34 Ohio St. 238. The California and Iowa cases, holding local option unconstitutional, are entitled to great weight as authority. The constitution of Indiana is substantially the same as ours in this respect, and the Supreme Court of that state has held, that local option violates this provision of the constitution of the state.

The constitutions of New Jersey, Massachusetts and others of the states, where local option and kindred enactments have been sustained in the courts, are different.

The cases in those states are based upon police regulations not inhibited by the constitutions of those states. See the argument of Vansickle, Judge, in 36 N. J. 72. But this court has already held and determined, that laws regulating the traffic in intoxicating liquors, so far as bringing them within the crimes act, or making an act in relation thereto criminal,

are not local or police regulations, but are of a general nature. *State v. Winch*, 45 Ohio St. 663.

Also, this section of the constitution is mandatory and not directory, and therefore, cannot be evaded or disregarded. *Fulk Exp.*, 42 Ohio St. 638.

Every evil intended to be overcome by this provision of the constitution, as repeatedly announced by this court, may again prevail if this law can stand.

*M. H. Donahue*, Prosecuting Attorney, and *Reuben Butler*, for defendant in error, in the case of *Gordon v. The State*.  
*R. Butler's* brief.

From an examination of this act it will be seen that the policy of this law has been determined by the legislature, the law in and of itself being complete, and, upon its passage, took effect *in presenti*; nothing remaining except for the townships to avail themselves of its provisions, if they chose.

It is claimed that the law is inhibited by Art. II, Sec 26 of the constitution. It is also claimed to be a delegation of legislative authority, and therefore, unconstitutional.

*First*—It will be remembered that by Sec. 1, Art. II, "The legislative power of the state shall be vested in the general assembly." What power? All legislative power which the object and purposes of the state government require; keeping in view, however, other provisions of the constitution, to see how far, and to what extent, legislative discretion is qualified or restricted. Hence the difference between the Constitution of the United States and our state constitution. In the former, we look to see if a power is expressly given, and in the latter to see if it is limited or denied.

Every intendment is in favor of the constitutionality of a law; the judgment of the assembly passing it is of value and must not be ignored, and the court must see clearly, before it declares an act unconstitutional.

We regard this as an open question in this state, and will be decided upon principle, aided by authority, so far as it gives light. And we claim, as we shall hereafter show, that the weight of authority and reason sustain and uphold this law.

---

Gordon v. The State—Santoro v. The State.

---

*Second*—This is a law to take effect upon a contingency, to-wit: that of a vote for or against it—the time of its going into operation being postponed to a later day. If so, there can be no constitutional question urged against it. Cooley on Const. Lim. 121, 122, 123, 389; *Bank v. Brown*, 26 N. Y. 472; *Locks Appeal*, 72 Pa. St. 491; *Sanford v. County of Mains*, 36 N. J. 72; *Fell v. State*, 42 Md. 71; Bouv. Law Dic. "Local Option"; *State v. Cook*, 24 Minn. 247; *Commonwealth v. Wheeler*, 14 Bush. 28; *State v. Wilcox*, 42 Conn. 364.

There is a class of cases in Ohio, quite analogous on principle to the one at bar, where the legislature has authorized townships, counties, etc., by vote, to avail themselves of the provisions of certain statutes of this state; authorizing them, upon a majority vote, to subscribe to the capital stock of railroads. *C. W. & Z. Ry. v. Commissioners*, 1 Ohio St. 77; *Cass v. Dillon*, 2 Ohio St. 607; *Baker v. Cincinnati*, 11 Ohio St. 534; *Hopple v. Brown Tp*, 13 Ohio St. 311; *Newton v. Mahoning Co.*, 26 Ohio St. 610; *Paris Tp v. Cooney*, 8 Ohio St. 564; *State ex rel. v. Perry Co.*, 5 Ohio St. 487; *Ohio ex rel. v. Covington*, 29 Ohio St. 102; *State v. Board of Education*, 38 Ohio St. 3.

*Third*—We submit that this is a question of police regulation solely, and in order to properly test this question we must start with first principles. Townships exist under general laws of the state, which apportion the state into political divisions for convenience of government, and require of the people residing within these divisions the performance of certain public duties as a part of the machinery of the state government; and, in order that they may perform these duties, vest them with certain corporate powers. The people of these subdivisions have no choice in the matter. They are corporations with limited powers, given them by statute, and the same may be said of all corporations which have from time to time been created. Cooley on Const. Lim. 240, 241, 247; Bouvier's Law Dic. title, "Municipal Corporations;" Dillon on Municipal Corporations, 94; *Hopple v. Brown Tp*. 13 Ohio St. 324, 331; Rev. Stat. Ohio, sec. 1376.



It may be said, that inasmuch, as it was lawful in this state to traffic in intoxicating liquors, prior to the passage of this act, that when the electors of a township avail themselves of its provision by vote, that it has the effect to suspend the law in force upon that subject, and therefore, that the power of suspending this law was exercised by other power than the general assembly; but this theory is untenable. The act under consideration was passed *in presenti*; took effect immediately upon its passage; and, if not in words, by implication, repealed all prior inconsistent acts, conferring power upon townships to avail themselves of its provisions by vote. It was, and is, a police regulation of the state, of uniform operation; but not of universal operation throughout the state; for it might be adopted by some townships, and not by others, and therefore not of universal operation, but uniform, because all may avail themselves of its provisions. This statute is strictly a police regulation, which in criminal proceedings is defined in Bouvier thus: "*Malum in se*. Evil in itself." An offense, *malum in se*, is one which is naturally evil, as murder, theft and the like. Offences at common law are generally *malum in se*.

An offense *malum prohibitum*, on the contrary, is not naturally evil, but becomes so by being forbidden. Now to make this definition apply to this case we will do well to examine *Falk ex parte*, 42 Ohio St. 644; *Ruffner v. Commissioners*, 1 Disney, 200.

As to the term "uniform operation." It is not confined to the taking effect and being a law throughout the state. . It is sufficient that it may operate uniformly at the discretion of different and distinct bodies throughout the state. The exercise of the power granted under this act, depends upon the discretion of those bodies; and in some townships it may be exercised and in some it may not. Does the operation of the law consist in the grant of power, or its exercise? If the latter, it seems clear that such law is not one having a uniform operation throughout the state. It may be a general law because, in general terms and by a general description, it is applicable to all. It confers powers upon distinct bodies of men,

---

Gordon v. The State—Santoro v. The State.

---

but these bodies of men may, and in many cases, of necessity must, exercise the power differently. *Ruffner v. Commissioners*, 1 Disney, 204, 205; Cooley on Const. Lim., 3 Ed. 389. We, therefore, conclude that, the traffic in intoxicating liquors, prohibited by this act, not being an offense *malum in se*, but *malum prohibitum*, is within the definition of "police regulation," as given in *Ex parte Falk*, 42 Ohio St. 644, and is not a law of a general nature within the meaning of the constitution; and being a police regulation, the legislature may prohibit, by general law, and in the same act empower the townships to avail themselves of its provisions; and the act is valid, though some townships may, and others may not, adopt it.

*Fourth*—We repeat, that townships have the same right to legislate, and are as much little republics as any other municipalities, within the statutory powers conferred upon them. The American government is one of complete decentralization, and this impels the several states to subdivide their territory into towns, road and school districts, and to confer upon each the power of legislation upon subjects where special authority has been given them. Cooley on Const. Lim. 189, 190; *Bronson v. Oberlin*, 41 Ohio St. 476; *Burckholter v. McConnellsville*, 20 Ohio St. 309.

*Fifth*—This statute is a police regulation of the state, which Blackstone says is "the due regulation and domestic order of the kingdom whereby the inhabitants of a state, like a well governed family, are bound to conform their behavior to the rules of property, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations." By the general police power of the state, persons and propriety are subjected to all kinds of restraint and burdens to secure the general health and prosperity of the state, and of this there has never been a question made. Cooley on Const. Lim. 572, 573, 581, 595; *Id.* 152, 153; *Railroad v. Sullivan*, 32 Ohio St. 152.

According to the maxim, *sic utero tuo ut alienum non laedas*, (so use your own as not to injure another's property), which being of universal application, it must, of course, be within the

range of legislative action to define the mode and, manner in which every one may so use his own as not to injure others. By this general police power of the state, persons and property are subjected to all kinds of restraint and burdens, in order to secure the general comfort, health and prosperity of the state. *Holt v. Roe*, 39 Ohio St. 340; *Ohio ex rel. v. Covington et al.*, 29 Ohio St. 102; *Railway v. Railway*, 30 Ohio St. 604.

*Sixth*—The policy of this state is that localities may avail themselves of the statutes at their option. 24 Ohio St. 335; 27 Ohio St. 66.

*David K. Watson*, Attorney-General, for the state, in both cases.

1. The first reason assigned by counsel why the act is unconstitutional is, that, "It is an act of a general nature and has not a uniform operation throughout the state."

Grant that the act complained of, and under which the plaintiff in error was convicted, is a law of a general nature, has it not a *uniform operation* throughout the state? What is a law of *uniform operation*? Is not a law which applies alike to every township in the state one of uniform operation, although some of the townships may not avail themselves of its provisions? Is the uniformity of a statute to be denied or defeated, because some townships do, and others do not, avail themselves of its provisions? If the opportunity be granted to *all* the townships in the state alike, does not this operate to make the law uniform in its application, and give it a uniform operation?

Look at the provisions of the act. It does not say that whenever one-fourth of the qualified electors of *any number* of townships, or any particular township, or townships, but whenever one-fourth of the qualified electors of *any* township. There is no discrimination in this language. The opportunity to vote upon the question of the sale of intoxicating liquors as a beverage, is given in this act alike to the electors of *every* township in the state, and it does not follow that because the electors in some townships do, while others do not, vote upon

the question, that therefore the act is void for want of uniformity in its operation. The punishment provided for a violation of the act (in case the electors of any township vote to suppress the sale of intoxicating liquors therein) is also the same in every township, and consequently of uniform operation. This precise point was presented, in *Commissioners of Leavenworth Co. v. Miller*, 7 Kan. 479.

Article II, sec. 17, of the constitution of Kansas, provides that, "All laws of a general nature shall have a uniform operation throughout the state."

To the same effect is the case of *McAunich v. The M. & M. Ry. Co.*, 20 Iowa, 338. It involved the consideration of a similar provision of the constitution. Art. I, sec. 6. See also *Marmet v. State*, 45 Ohio St. 63; *State ex rel. Att'y Gen. v. Shearer et al.*, 46 Ohio St. 275; *State ex rel. Att'y Gen. v. Hudson*, 44 Ohio St. 137; *Groesch v. The State*, 42 Ind. 547; *Heck v. The State*, 44 Ohio St. 536.

2. As to the second proposition of counsel for plaintiff in error, that: "It is a delegation of legislative power to the people."

Does the act, in providing for an election, in any township, which shall determine *whether the act shall be executed* amount to a delegation of legislative power to the people, and thereby render the act unconstitutional? I maintain that such provision in the act does not amount to a delegation of such power, and I claim the true rule in such cases to be, *that when an act of the general assembly makes its execution contingent upon a vote of the electors to be affected by it, such a provision is not a delegation of such legislative power to the people as to render the act FOR THAT REASON unconstitutional.* We are not without decisions upon this question by our own supreme court; for that judicial tribunal met the question at the very dawn of our new constitution, and while it was still uncertain whether the electors of the state would retain the old constitution, or adopt the new one. *C., W. & Z. R. R. Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 77; *Cass v. Dillon*, 2 Ohio St. 607; *Weaver, Trustee, etc. v. Cherry et al.*, 8 Ohio St. 564.

Looking beyond the decisions of our own Supreme Court to that of other states, we find the precise question involved here has been frequently determined. *Fell v. State*, 42 Md. 71; *Brig Aurora v. United States*, 7 Cranch, 382; *Erlinger v. Bonneau*, 51 Ill. 94; *Id.* 37; *Cain v. Commissioners*, 86 N. C. 8; *State ex rel. Attorney General v. O'Neill*, 24 Wis. 129; *Alcorn v. Hamer*, 38 Miss. 652; *Commonwealth v. Weller*, 14 Bush, 218; *State ex rel. v. Common Pleas Morris County*, 36 N. J. 72; *State v. Parker*, 26 Vt. 357; *State v. Wilcox*, 42 Conn. 364; *Caldwell et al. v. Barrett et al.*, 73 Ga. 604; *The State v. Noyes*, 30 N. H. 276; *State (Jeremiah Brown, Com.) v. Augustus B. Copeland*, 3 R. I. 33; *Bull et al. v. Reed et al.* 23 Gratton, 78; *Slinger v. Henneman*, 38 Wis. 504; *Gayle, Etc. v. Owen County Court*, 83 Ky. 62; *Boyd v. Bryant*, 35 Kan. 70.

3. The third cause assigned for the unconstitutionality of this statute is, that "it authorizes the people to suspend or repeal a law," to-wit: the "Dow law," and enact in its stead another. That is to say, under the provisions\* of the present law, in those townships where the vote would be "against the sale," the dealer must quit the business; and this would amount to a suspension or repeal of the act of May 14, 1886, Ohio laws, vol. 83, p. 157, commonly known as the "Dow law."

This cannot be maintained. It would not amount to a suspension of a law, in contravention of the constitution. The statute of 1886 at most, only conferred a *conditional* right to carry on the business of dealing in intoxicating liquors, and the condition was subject to revocation at any time by municipalities by the terms of the statute. The effect of the act of 1888, being the act in question, simply confers upon the electors of a township that authority which belonged to municipalities.

A similar question arose in *Burckholter v. Village of McConnellsville*, 20 Ohio St. 308; *Fell v. State*, 42 Md. 71; *Fox v. Fox*, 24 Ohio St. 335.

No one will question the power of the legislature to repeal laws, nor should it be questioned that the legislature has

the power to provide for the repeal or suspension of a law by inserting a provision in a statute, by which the statute is to take effect upon the happening of a contingency depending upon the vote of the people.

4. The last reason urged against the constitutionality of this law is "that it seeks to prohibit the liquor traffic when the only power the legislature has, is to regulate it."

This raises the question of the power of the general assembly, under the 9th section of the XV Article of the constitution, which is the same as section 18 of the schedule, and is as follows:

"No license to traffic in intoxicating liquors shall hereafter be granted in this state; but the general assembly *may, by law, provide against evils resulting therefrom.*"

"But the general assembly may, by law, provide against evils resulting therefrom." What is meant by this last clause? What was it intended to mean? Why was it put into the section or the constitution? It does not necessarily imply that prohibition was not contemplated by the first clause of the section; but it simply indicates that the framers of the constitution knew that intoxicating liquors had been, and therefore would probably continue to be, drunk as a beverage, and while they had provided against the state granting a *license* to that effect, they further desired to clothe the general assembly with constitutional power to legislate against the evils which they supposed and believed would result from the traffic, notwithstanding the prohibition against license. But to what extent has this power been given? It is not specifically pointed out how it is to be exercised; nor are there any special limitations upon its exercise. It is a *special* power given to the general assembly to provide by law against certain things, to-wit: the evils resulting from the traffic in intoxicating liquors. It is clear that a broad discretion is given to the general assembly by this section. It is the body which is to provide legal means against the evils resulting from the traffic, but the *kind of provision* it is to make, is not specified or mentioned; nor is there any expression in the constitution on that subject. The general assembly, is therefore left to its own judgment in the matter, to

make such provisions as to it seems best, in providing against such evils. *State v. Sinks*, 42 Ohio St., 345.

We have seen that in addition to the general legislative power conferred upon the general assembly, that body has been specially authorized by the constitution to do a special thing, against a special thing, to-wit: to provide, by law, against the evils resulting from the liquor traffic. This brings us to the proposition or question, when it authorizes the general assembly to "provide by law against the evils resulting *therefrom*" (meaning the liquor traffic), it thereby recognizes the *continuous existence of such traffic*.

If this is so, the question may well be asked to what extent is it to exist? If its existence is recognized as a continuing existence, then the only power delegated to the general assembly under the constitution is the power to limit, or restrain, or regulate, the evils, and this seems to be the theory upon which the decision in *Miller v. Gibson*, 3 Ohio St. 476, is based. But does it necessarily follow that *because* the general assembly is empowered to *provide against the evils resulting from the liquor traffic*, that *therefore* no power exists beyond that of regulating it? In other words, does this clause mean, that the traffic must exist, notwithstanding the power is conferred upon the general assembly to provide against the evils resulting from it? I do not think so. The general assembly is the judge and the sole judge. If in its opinion the evils resulting from the traffic should be provided against, it has the power to do so. The power conferred by this clause of the constitution is a varying power, limited only by the judgment of the general assembly. If in its judgment a sufficient protection against the evils resulting from the traffic in intoxicating liquors can be obtained by a regulation of the traffic in a certain locality, it has the power so to provide. If upon the other hand, in order to provide against such evils in some other locality, more stringent regulation is required, in the judgment of the general assembly, it also has power to provide it, and so on to the end, that, if in the judgment of the general assembly, in order to provide by law *against* these evils, it is necessary to *prohibit the existence of the cause of the*

*evils*, why is not the power to do so conferred by the constitution? If the theory that the legislature can do no more than regulate is to prevail, then I ask how far is this theory to be carried, for, *regulation extended is prohibition*. Much stricter regulation may be required in one place than in another, and you may carry your power to regulate so far that in the end you have practical prohibition; for it is not contended that the *degree or extent to which regulation can be carried can be controlled*. *State v. Sinks, supra*; *State v. Frame*, and *Benner v. Bauder*, 39 Ohio St. 399; *Heck v. State, supra*.

We already have prohibition in many portions of the state, under the act of May 14, 1886, commonly known as the Dow law. The 11th section of that act expressly provides: "Any municipal corporation shall have full power to regulate, restrain and *prohibit* ale, beer, porter houses, etc.;" and in many of the cities and towns of the state the councils have availed themselves of this provision, and ordinances have been passed to this end, and are now in full force and effect. But this act also operates upon townships. The first section thereof provides that upon the *business* of trafficking in spirituous, vinous, malt or any intoxicating liquors, there shall be assessed, yearly, etc., the sum of \$200, etc. The law is general in its nature and uniform in its operation, and it is a matter of common and current history that the effect of this act was to bring about prohibition in many of the townships of the state. Yet it is simply a mode of regulation. No one will question, however, but the general assembly has the power to fix the tax which that law requires to be paid by a person engaged in the business of trafficking in intoxicating liquors at one thousand dollars per annum, instead of two hundred, as fixed in the act; and will any one doubt that such a tax would result in the prohibition of the liquor traffic in the townships? For who could afford to pay such a sum in order to carry on the business in a locality remote from the centers of population? This would still be regulation, but it would also be prohibition, and the logic of the argument is that you may regulate to such an extent that you effectually prohibit the liquor traffic. The validity of the act of 1886 was sustained



in *Adler v. Whitbeck*, 44 Ohio St., 539. See also, *Madden v. Smeltz*, 2 Ohio C. C. Rep. 168; 33 Wis., 107; *Mugler v. Kansas*, 123 U. S. 623; *Cooley on Const. Lim.*, 148.

The tendency of the later decisions is to sustain the constitutionality of such laws. Modern legislation, indicative, perhaps, of the will of the people, from whom all legislative power is originally derived, has taken an advanced position concerning the regulation of the liquor traffic, and in providing against the evils resulting therefrom. Power has been given to municipalities and counties to limit, restrain and prohibit intoxication and the traffic in intoxicating beverages; yet such legislation has not been any special strain upon the state constitutions; for such of those instruments as have been subjected to judicial tests, in this regard, have usually been held broad enough to authorize such legislation. In Ohio the general assembly has conferred the power of prohibition upon municipalities, and its constitutionality has been maintained.

The case was also argued orally by all of the above named counsel. In addition, oral arguments were made on behalf of the state, by *C. H. Grosvenor* and *D. L. Sleeper*, of Athens county, there being similar cases then pending in the courts of that county.

The case of *Santoro v. The State*, was also argued orally, by *E. W. Maxson*, Prosecuting Attorney of Portage county, on behalf of the state.

DICKMAN, J. In the case of *Gordon v. The State*, there was a motion to quash the indictment, on the ground, that it did not set forth the name or names of any person or persons to whom the sale of intoxicating liquors was made, and that it was objectionable for duplicity. The indictment alleged, that the accused unlawfully sold intoxicating liquors as a beverage, to divers persons whose names to the jurors were unknown. This we deem sufficient. In those cases in which the names of third persons cannot be ascertained, they may be thus designated, in the usual form, as "persons whose names are to the jurors unknown." Thus, an indictment for harboring thieves unknown,

---

•      Gordon v. The State—Santoro v. The State.

---

is sufficient from the necessity of the case, upon the fair presumption, that the names cannot be discovered. And in indictments for assault, for felonious homicides, and the like, the person injured or killed may be mentioned as unknown, if such is the fact. 1 Chitt. Cr. Law, 211, 212; 2 Hawk's Pl. of Cr. 231; *Commonwealth v. Hitchings*, 5 Gray, 482; *Blodget v. The State*, 3 Ind. 403; *People v. Adams*, 17 Wend. 475; *Reed v. The State*, 16 Ark. 499; *Reg. v. Campbell*, 1 Car. & K. 82; *Reg. v. Stroud*, 2 Moody, 270.

The indictment was not bad for duplicity because it charged, that on the 22d day of December, 1888, the accused sold intoxicating liquors to *divers persons* whose names to the jurors were unknown. For aught that appears upon the record, the offense charged in the indictment may be deemed a single transaction occurring at the time and place set forth, and a conviction may be had upon proof of sale to one person. Upon the subject of duplicity, Waite, J., in *Barnes v. The State*, 20 Conn. 232, observed, "No matters, however multifarious, will operate to make a declaration or information double, provided, that all taken together, constitute but one connected charge, or one transaction." A man may, accordingly, be indicted for the battery of two or more persons in the same count; or for a libel upon two or more persons, when the publication is one single act; or for selling liquor to two or more persons without rendering the count bad for duplicity. *State v. Anderson*, 3 Rich. 172; *Rex v. Benfield*, 2 Bur. 980, 984; *Rex v. Jenour*, 7 Mod. 400. In *Rex v. Benfield* the question was asked, "Can not the king call a man to account for a breach of the peace, because he broke *two* heads instead of *one*? How many informations have been for libels upon the king *and his ministers*?"

But the further objection is raised, that the statute upon which the indictment was founded, is so defective in its provisions, that it cannot be properly executed, and therefore has no validity as a law. The grounds of objection are, that the act does not provide adequate means for determining, whether the signatures on the petition to the township trustees for an election are genuine, and whether the signers constitute one-

fourth of the qualified electors of the township; that there is no provision for the filing and preservation of the petition; and that, as the record of the result of the election is made only *prima facie* evidence that the selling of intoxicating liquors is prohibited and unlawful, it will become an issue of fact in every prosecution under the law; whether the law is in force or not. It may be fairly presumed, that the township trustees will not order a special election, as provided in the statute, until they have satisfactory evidence, that the petition to them has been signed by the requisite number of the qualified voters of the township. Nor is it to be presumed, that the township officers, in whom the people have reposed so much trust and confidence, will neglect to file and preserve the petition presented to them in their official capacity. And although the record of the result of the election is not made conclusive evidence, the statute is not thereby rendered inoperative. An act though not clear and definite—though vague and indefinite—as to its method of enforcement, may nevertheless be valid. It will not be declared void because it is difficult of execution, or because it fails to accomplish its purposes as fully as the legislature designed. As decided in *Cochran v. Loring*, 17 Ohio, 409, 427, "Though a law is imperfect in its details, it is not void, unless it is so imperfect as to render it impossible to execute it." The objection, therefore, above stated, does not impair the validity of the statute in question.

It is claimed, however, in the cases at bar, that there are constitutional objections which are fatal to the validity of the act of March 3, 1888. In the first place it is contended, that the act is of a general nature, and has not a uniform operation throughout the state, and is therefore in conflict with sec. 26, Art. II, of the constitution. Conceding for the purpose of this inquiry, that the act under consideration is a law of a general nature, it satisfies, in our view, the constitutional requirement that it shall be of uniform operation. It is an act, "to further provide against the evils resulting from the traffic in intoxicating liquors, by local option in *any township* in the state of Ohio." One-fourth of the qualified electors of *any township*, may petition the trus-

tees for the privilege of determining, by ballot, whether the sale of intoxicating liquors as a beverage shall be prohibited. The election is to be conducted, in all respects the same, in every township, and if the result of the vote is against the sale, the same penalty is attached in every township for carrying on the traffic. The provisions of the act are bounded only by the limits of the state, and uniformity in its operation is not destroyed, because the electors in one or more townships may not see fit to avail themselves of its provisions. The act makes no discrimination between localities to the exclusion of any township. Every township in the state comes within the purview of the law, and may have the advantage of its provisions by complying with its terms. The operation of the statute is the same in all parts of the state, under the same circumstances and conditions.

By the municipal code of May 7, 1869, section 199, it was declared, that all cities and incorporated villages should, among other things, have the power—and might provide by ordinance for the exercise of such power — “To regulate, restrain and prohibit, ale, beer and porter houses or shops; and houses and places of notorious or habitual resort for tippling or intemperance.” The uniformity in the operation of this law of a general nature, was not measured and fixed by the number of cities and incorporated villages that might exercise the granted power. One or many, might, like the village of McConnellsville, pass the needful ordinances, but the provision of the code was none the less of uniform operation throughout the state. The feature of uniformity in the local option law under consideration, would no more be marred because the qualified electors of the townships generally fail to adopt its provisions, than the above enactment of the municipal code would have ceased to operate uniformly, because cities and incorporated villages did not generally pass ordinances to prohibit ale, beer and porter houses.

A clause in the constitution of California, like that in the constitution of this state, provides that, “all laws of a general nature shall have a uniform operation.” In *Smith v. The Judge of the Twelfth Judicial District*, 17 Cal. 554, Bald-

win, J., referring to this provision says, "The language must be carefully noted. The expression is, that these laws of a general nature shall be uniform in their operation; that is, that such laws shall bear equally in their burdens and benefits upon persons standing in the same category."

In *Brooke v. Hyde*, 37 Cal. 375, it was said by Sanderson, J., "By uniform operation, I understand an operation which is equal in its effect upon all persons or things upon which the law is designed to operate at all." The meaning of the provision was there held to be, "that every law shall have a uniform operation upon the citizens or persons, or things of any class, upon whom or which it purports to take effect, and that it shall not grant to any citizen, or class of citizens privileges, which, upon the same terms, shall not equally belong to all citizens."

Section 17, Article II, of the constitution of Kansas also requires that, "all laws of a general nature shall have a uniform operation throughout the state." In *Commissioners of Leavenworth County v. Miller*, 7 Kan. 479, it was held, that where the provisions of an act are designed for the whole state, and every part thereof, such act has, in contemplation of section 17, Article II, of the constitution, a uniform operation throughout the state, notwithstanding the condition or circumstances of the state may be such as not to give the act any actual or practical operation in every part thereof. In that case, there came under review an act of the legislature which provided, that the board of county commissioners of any county to, into, through, from, or near which any railroad might be located, might subscribe to the capital stock of any such railroad corporation, in the name and for the benefit of the county, to an amount not exceeding the sum of \$300,000, in any one corporation, and might issue bonds of the county in payment for the stock. But no such bonds should be issued, until the question was first submitted to a vote of the qualified electors of the county, at some general or some special election. The Commissioners of Leavenworth County called a special election, to determine by vote of the electors, whether the board of commissioners should subscribe \$250,000

to the capital stock of the "Union Pacific Railway Co. Eastern Division," and issue the bonds of the county in payment for the stock. Miller sued the commissioners upon one of the bonds issued, and it was set up in defense, that the act under which the bonds were issued was unconstitutional, that the bonds were therefore issued without authority and were void. On this point the language of the court was, "We scarcely think it necessary to say anything with reference to section 17, Article II of the constitution. The act under consideration is so obviously in harmony with this section, that the question attempted to be raised upon its supposed incongruity needs no elucidation from us. All the provisions of said act are expressly enacted for the whole state, and for every part of the state, and it is no more necessary that the same amount of stock be taken in each and every county of the state, in order that the act shall have a uniform operation therein, than that the same number of men shall be executed in each county of the state, in order that the law punishing murder in the first degree shall have uniform operation throughout the state."

We cannot reach the conclusion that, because the electors of one township may decline to petition the trustees to order a special election to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited, every other township in the state shall be deprived of that privilege, on the ground that the act is not capable of a uniform operation. Without seeking an authoritative definition of the term "law of a general nature" in its constitutional sense, we are of the opinion, that the act of March 3, 1888, is not open to the objection that it is not susceptible of the uniform operation contemplated in the constitution.

But it is further contended, that the act is a delegation of legislative power to the people, and therefore in contravention of section 1, Article II, of the constitution. That section provides, that the legislative power of the state shall be vested in a general assembly, which shall consist of a senate, and a house of representatives. It is a general rule, that the agent whose employment and trust are personal, can not, without express or implied authority from his principal, delegate his power.

And it is a settled maxim, that when the people, in their sovereign capacity, have by the constitution conferred the law-making power upon the legislature, that department can not delegate such power to any other body. The power must remain where located, and laws must be enacted through the established agency, until there is a change in the constitution itself. Yet, while the principle may be universally recognized, that the legislature can not evade its constitutional trust as the law-making agent, difficulty may arise in determining, whether by any special act the legislature has, directly or indirectly, sought to divest itself of its constitutional authority and obligation. The natural tendency of the legislative department is to encroachment, and we may well be inclined, in the first instance, to question whether it has relinquished any portion of its power.

In the exercise of the duties devolved upon the legislative branch of the state government, it is manifest that discretion and judgment are required, not only in determining the subject-matter of legislation, but not unfrequently in ordering the conditions or contingencies upon which laws are to be carried into effect. It may be deemed expedient in one case, to provide for preliminary action before a law is executed, which under other circumstances would not be adopted. In requiring such proceedings prior to the enforcement of a law, the legislature need not be prevented from keeping within the strict line of its authority.

It is evident, we think, that the act whose constitutional validity is called in question, was a complete law when it had passed through the several stages of legislative enactment, and derived none of its validity from a vote of the people. In all its parts it is an expression of the will of the legislature, and its execution is made dependent upon a condition prescribed by the legislative department of the state. By its terms, it was made to take effect from and after its passage. The qualified electors derive their authority to petition the trustees, and the trustees obtain their authority to order a special election, directly from the legislature. The right of the electors to register their votes for or against the sale of intoxicating

liquors, is conferred by the same body. If a majority of the votes cast at such election should be against the sale, the traffic in intoxicating liquors is thereby prohibited and made unlawful, by virtue of the act of the general assembly, which may at once, if a change should come over the legislative will, repeal the law and avoid the result of the election. So far from the vote of the electors breathing life into the statute, it is only through the statute that the electors are entitled to vote at the special election. While they are free to cast their votes, the consequence of their aggregate vote is fixed and declared by the act of the legislature. The penal sanction of the act is subject to no modification by the action of the electors, and it is an elementary principle that, "the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws." 1 Black. Com. 57. In some of the authorities which we have examined, the idea is prominent, that when the voters are called on to express by their ballots their opinion as to the subject-matter of the law, they declare no consequence, prescribe no penalties, and exercise no legislative functions. The consequences, it is said, are declared in the law, and are exclusively the result of the legislative will.

In *Commonwealth v. Weller*, 14 Ky. 218, an act to prohibit the sale of intoxicating liquors in the county of Bullitt, provided that, "it shall take effect whenever it shall be ratified by a majority of the voters of said county." The view taken by the court in construing the act was, that the legislature was not attempting to delegate its authority to a new agency; that when the act passed the legislature, and was signed by the executive, it became a law, and *by reason of the law*, the people interested in its passage were authorized to vote for or against its provisions; that the making its operation to depend on the popular vote was a part of the law itself, and its going into operation on the contingency that the people voted for it, was the legislative will on the subject.

In the well known case of *C. W. & Z. Railroad Co. v. Com'rs of Clinton County*, 1 Ohio St. 77, the county commissioners were authorized by an act of the general assembly, to



subscribe to the capital stock of the company, the question of subscription having been first submitted to the qualified electors of the county. "We think it," says Ranney, J., in delivering the opinion of the court, "undeniable, that the complete exercise of legislative power by the general assembly, does not necessarily require the act to so apply its provisions to the subject matter, as to compel their employment without the intervening assent of other persons, or to prevent their taking effect, only, upon the performance of conditions expressed in the law. \* \* \* The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

The local option act under consideration is, virtually, a law to prohibit the sale of intoxicating liquors upon the contingency, that a majority of the qualified electors of any township shall vote against the sale. Practically, it is to go into operation upon such contingency. "Many laws," says Scott, J., in *Peck v. Weddell*, 17 Ohio St. 271, "can only operate upon the happening of certain contingencies; yet they are nevertheless valid." Indeed, the doctrine is generally accepted, that it is within the scope of the legislative power, to enact laws which shall not take effect until the happening of some particular event, or in some contingency thereafter to arise, or upon the performance of some specified condition. May not the execution of a law depend upon the condition of a popular vote, as well as upon any other fair and reasonable contingency? The language of Redfield, C. J., in *State v. Parker*, 26 Vt. 357, carries with it great force. "After a full examination," says he, "of the arguments by which it is attempted to be maintained that statutes made dependent upon such contingencies are not valid laws, and a good deal of study and reflection, I must declare, that I am fully convinced—although at first, without much examination, somewhat inclined to the same opinion—that the opinion is the result of false analogies, and so

founded upon a latent fallacy. It seems to me that the distinction attempted between the contingency of a popular vote and other future uncertainties, is without all just foundation in sound policy or sound reasoning, and that it has too often been made more from necessity than choice—rather to escape from an overwhelming analogy, than from any obvious difference in principle in the two classes of cases; for, \* \* \* one may find any number of cases, in the legislation of congress, where statutes have been made dependent upon the shifting character of the revenue laws, or the navigation laws, or commercial rules, edicts, or restrictions of other countries.” The act of congress which came under review before the Supreme Court of the United States, in the case of the *Brig Aurora v. The United States*, 7 Cranch, 382, is a familiar example of our federal legislation.

In the case of *Smith v. Janesville*, 26 Wis. 291, Dixon, C. J., in discussing this subject, thus observes: “It is said that the act is void, or at least so much of it as pertains to the taxation of shares in national banks, because it was submitted to a vote of the people, or provided that it should take effect only after approval by a majority of the electors voting on the subject at the next general election. This was no more than providing that the act should take effect on the happening of a certain future contingency, that contingency being a popular vote in its favor. No one doubts the general power of the legislature to make such regulations and conditions as it pleases with regard to the taking effect or operation of laws. They may be absolute, or conditional and contingent; and if the latter, they may take effect on the happening of any event which is future and uncertain. Instances of this kind of legislation are not unfrequent. \* \* \* We are constrained to hold, therefore, that this act is and was in all respects valid from the time it took effect; and consequently that there was no want of authority for the levy and collection of the taxes in question.”

We are aware, that there are adjudged cases which, it is urged, militate against the views we herein advance. The cases of *Rice v. Foster*, 4 Harr. 479, and *Parker v. The Com-*

*monwealth*, 6 Pa. St. 507, are mainly relied upon; but, in *Railroad Company v. Commissioners of Clinton County*, *supra*, this court drew the distinction, that the voters in those cases were not called upon to determine on the execution of a law under and in conformity to its provisions, but whether the law itself should continue to exist. And in *Lock's Appeal*, 72 Pa. St. 491, the case of *Parker v. The Commonwealth* was held to have been overruled soon after it was decided; not in express terms, but by undermining its foundation in holding that laws could constitutionally be made dependent on a popular vote for their operation. Agnew, J., said., "This popular vote is but the law's appointed means of determining a result, which the law enacts, in an alternative form, shall be the contingency of its operation. \* \* \* The true distinction, I conceive, is this: the legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."

There have been numerous decisions and much discussion concerning the validity of statutes denominated local option laws; and the subject of contingent legislation has given rise to wide debate and many adjudications, but we do not consider it necessary, in this branch of our inquiry, to make further citation of cases or opinions.

It is argued however, that the act of March 3, 1888, seeks to prohibit the liquor traffic, while the legislature has power only to regulate it, and is therefore in conflict with the constitution. The 9th section of Article V of the constitution, which is the same as section 18 of the schedule, is as follows: "No license to traffic in intoxicating liquors, shall hereafter be granted in this state; but the general assembly may by law, provide against the evils resulting therefrom." Suppose that section were eliminated from the constitution, it would not be easy to establish that, the legislature might not, under the broad grant of legislative power, sanction or prohibit, at its pleasure, the traffic in intoxicating liquors as a beverage. "The legislative power of this state shall be vested in a general assembly," is the language of the constitution; and in

the provisions of that section of the schedule, we can find no implied limitation upon the legislative power, whereby, the general assembly would be forbidden to legislate for the prohibition of such traffic in intoxicating liquors. Whether under the ordinary constitutional limitations, the absolute prohibition of the liquor trade is a constitutional exercise of legislative authority, is a question that has largely engaged the attention of judicial tribunals. The question involves a consideration of the police power, and the department of government which can and does exercise that power, is the legislature; and it is among the limitations upon the legislative power, that we are to seek the limitations upon the police power over the liquor traffic. In the recent case of *Mugler v. Kansas*, 123 U. S. Rep. 623, it was recognized as a fundamental rule that, it belongs to the legislative branch of the government to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety. Justice Harlan in pronouncing the opinion of the court in that case says: "If, therefore, a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts can not, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation." In Tiedeman's *Limitations of Police Power*, § 103, this subject has been treated with much research and ability; the numerous cases are there collected; and it is stated by that author as evident, that the decisions of the courts in different parts of the country, have generally sustained laws for the prohibition of the sale of intoxicating liquors, in any manner, form or bulk whatever, and on the ground that the trade works an injury to society, and may, therefore, be prohibited.

The grant of legislative power in the present constitution, is found, in very nearly the same words, in the constitution

adopted in 1802. But, in view of the practice under the former constitution, which contained no provisions relative to the subject of intoxicating liquors, and under which many acts called "license acts" were passed by the general assembly, the framers of the present constitution inserted the section of the schedule, which, when adopted and made part of the constitution, would prevent the granting of licenses to traffic in intoxicating liquors, and empower the general assembly to provide against the evils resulting therefrom. The restriction upon the legislative power, which forbids the granting of any such license, can not, we conceive, be construed into a definitive settlement of the extent to which the legislature may go, in the direction of prohibiting the traffic in intoxicating liquors as a beverage. To say that no license shall be granted, is not to say, by implication, that such traffic may not be prohibited. The refusal to license is obviously not out of the direct line of prohibition. The adoption by the people, as part of the constitution, of a provision which placed under interdiction the license to trade in liquor, was an expression of the popular will that, the state should not thereafter, by its affirmative action, through the general assembly, extend favor or encouragement to the traffic. But, though the authority of the legislature was thereby abridged, to the extent of forbidding the passage of any act to license the traffic, the ample grant of legislative power to the general assembly remained sufficient, when called into exercise, for all the purposes of prohibiting the sale of intoxicating liquors as a beverage. If any doubt, however, was to arise in the future, as to the authority conferred by the grant of legislative power, over that form of the liquor traffic, the removal of that doubt was sufficiently assured by the provision, that the general assembly may by law, provide against the evils resulting from the traffic.

When the the general assembly was clothed with authority by the constitution, to provide by law against the evils resulting from the traffic in intoxicating liquors, it was left to its discretion—subject to such express limitations as the constitution imposed—to select the means whereby those evils might be avoided. The legislature, in the plenitude of its discretion,

having determined upon the methods of providing against such resulting evils, it would not be for the judicial branch of the state government to interfere. "If," says McIlvaine, J., in *The State v. Frame*, 39 Ohio St. 399, "in the judgment of the general assembly, it be necessary, in order to prevent evils resulting from the traffic, that the sale and use of intoxicating liquors as a beverage, be absolutely prohibited, we can see no constitutional ground upon which such exercise of its judgment and discretion can be reviewed." And if in view of diminishing those evils, a system of regulation is adopted which practically prohibits the sale of intoxicating liquors as a beverage, it is not for this court to say, there has been a misuse of legislative discretion. This court has held, in *Adler v. Whitbeck*, 44 Ohio St. 539, that the general assembly is vested with the power, in regulating the traffic in intoxicating liquors, to levy a tax upon the business; but, while the tax is fully authorized, it may, from its magnitude prove so onerous as virtually to amount to a prohibition of such business.

A tax thus burdensome, when levied, might operate as a prohibition of the sale of intoxicating liquors as a beverage, as well in the townships, as in the municipal corporations of the state. But, it is contended, that there is no authority to directly prohibit the sale in townships, whatever may be the power of the general assembly in regard to municipal corporations, through the medium of city or village ordinances. In our judgment, when it is conceded, that in providing against the evils resulting from the traffic in intoxicating liquors as a beverage, the legislature may, without infringing the constitution, prohibit the sale, such prohibition may extend to townships as well as to other divisions of the state. Whatever legislation may be legitimate and necessary for the mitigation or suppression of the evils resulting from the traffic, should reach localities where such evils may exist, whether townships or municipal corporations.

After examining the many authorities cited, and giving due weight to the arguments of counsel, we are unable to reach the conclusion, that the statute under review is void for repugnancy to the constitution, on any ground that has been

## Braden v. Hoffman.

taken. Certainly, we do not feel that clear and strong conviction of the incompatibility of the constitution and the law with each other, which, as Chief Justice Marshall said, should always exist before the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void.

The judgment, therefore, of the court of common pleas in *Gordon v. The State*, and of the circuit court in *Santoro v. The State*, should be affirmed.

*Judgment accordingly.*

## BRADEN v. HOFFMAN.

*Vacating judgment.*

1. An order of the court of common pleas, made on motion of the defendant, and vacating a default judgment entered at a previous term, for irregularity in obtaining the same, is an order affecting a substantial right made upon a summary application after judgment, and may be reversed, vacated, or modified for errors appearing on the record.
2. Although the court may have decided that there is good ground to vacate on motion such judgment rendered on default at a preceding term, it is error to vacate the same before it has been adjudged that there is a valid defense to the action; and if, on error, such adjudication is not shown by the record, it will not be presumed.
3. B. at the January term, A. D. 1885, of the court of common pleas, recovered a judgment by default against H. At the next term, H. moved to set aside the judgment for irregularity in obtaining the same, which motion was granted, the judgment vacated, and ten days allowed in which to file answer. Held: This was error. *Frazier v. Williams*, 24 Ohio St. 625, followed and approved.

(Decided December 10, 1889.)

ERROR to the Circuit of Hamilton County.

*Harding & Moore*, for plaintiff in error.

*J. T. De Mar* and *W. C. Hicks*, for defendant in error.

DICKMAN, J. The plaintiff in error, Emma Braden, on an appeal from a judgment of a justice of the peace, recovered a

46	639
49	301
46	639
64	456

---

Braden v. Hoffman.

---

judgment in the Court of Common Pleas of Hamilton County, at the January term, A. D. 1885, against the defendant in error, John S. Hoffman, for the sum of two hundred and fifty-six dollars and seventy-five cents, with interest thereon—the defendant in the action being in default for an answer or demurrer to the petition. At the May term, A. D. 1885, of the court of common pleas, to-wit: on the 11th day of June, the defendant moved the court to set aside the judgment; and thereafter, at the same May term, A. D. 1885, the following entry was made upon the journal of the court:

“Now come the said parties with their respective attorneys, and thereupon this cause came on to be heard upon application of defendant for leave to amend his motion filed June 11, 1885, to set aside judgment, and for a new trial, by adding thereto the following as the grounds of said motion, viz: “Irregularity in obtaining said judgment, and mistake, omission or neglect of the clerk,” and it being made to appear to the court that there was irregularity in the obtaining of said judgment, it is ordered that said motion be amended accordingly, and thereupon said motion as amended coming on to be heard, the court having fully considered the same, it is ordered by the court that on payment of all the costs in this court, judgment be and is hereby set aside, and ten days are hereby given in which to file answer, to which plaintiff excepts.”

The plaintiff below filed her petition in error in the circuit court, to reverse the order of the court of common pleas vacating the judgment entered at the previous January term. The circuit court affirmed the order of the court of common pleas, and it is now sought to reverse the judgment of affirmance, and the order of the court of common pleas.

The order of the court of common pleas sustaining the motion, and setting aside the judgment rendered at the preceding term, is to be deemed a final order, and therefore a proper subject of review on error. It was such “an order affecting a substantial right made upon a summary application in an action after judgment,” as may, by a proceeding in error, be reversed, vacated or modified for error appearing on the record.

Rev. Stats., secs. 6707-6710; *Hettrick v. Wilson*, 12 Ohio



St. 136; *Taylor v. Fitch*, Ibid. 169. As said by the court in *Huntington v. Finch*, 3 Ohio St. 447, "The power of the court to set aside or vacate its judgments, subsequent to the judgment term, is governed by settled principles, to which the action of the court must conform, and for a departure from which, any judgment or order may be subject to be reviewed and reversed, on proceedings in error."

The main question, however, for consideration is, did the court below err in granting the motion, and in setting aside the judgment rendered at a former term? Under sec. 5354, sub-division 3, of the Revised Statutes, a court of common pleas, may vacate or modify its own judgment or order, after the term at which the same was made, for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order. As provided by sec. 5357, of the Revised Statutes, the proceedings to correct such mistake, omission or irregularity shall be by motion, upon reasonable notice to the adverse party, or his attorney in the action. The journal entry shows that the court granted the motion to set aside the judgment on the ground that there was irregularity in the obtaining of it; and though the record is silent in regard to notice to the adverse party, a waiver of notice is shown by the appearance of the plaintiff and her excepting to the order of the court.

But by sec. 5360, of the Revised Statutes, a judgment shall not be vacated on motion until it is adjudged that there is a valid defense to the action in which the judgment was rendered; and when a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment. And by sec. 5359, of the Revised Statutes, the court must first try and decide upon the grounds to vacate or modify a judgment or order, before trying or deciding upon the validity of the defense.

In *Frazier v. Williams*, 24 Ohio St. 625, it was held that, the object of these provisions of the statute in postponing the judgment to vacate until it shall be adjudged that there is a valid defense to the action, is to preserve the liens and rights

---

Braden v. Hoffman.

---

of parties under the original judgment, in case a similar judgment should be rendered upon the trial of the cause. It was construed to be the meaning of the statute, that when the court has decided that there is good ground to vacate, the judgment to vacate should be suspended until after the cause is tried; and if, on such trial, the defense is established, then judgment of vacation is to be entered; or, if the defense fails, the judgment is to be affirmed, or such other judgment entered as the result of the trial indicates.

The record in the case at bar does not show that, before setting aside the judgment, there was an adjudication upon the validity of the defense to the action, and until it was adjudged that there was a valid defense, there was, in our view, no authority in the statute to vacate the judgment. But it does appear by the record that, after deciding there was good ground to vacate, the court, instead of suspending the judgment to vacate until after an adjudication upon the validity of the defense, vacated the judgment absolutely, in the first instance, and allowed a given time thereafter in which to answer and set up defense. The design of the statute to preserve liens and priorities might thus be virtually defeated, although, upon the coming in of answer and the trial of the cause, by the court or by a jury, the defense might fail.

The maxim *omnia præsumentur rite acta*, can not avail the defendant in error. "The general principle of presuming a regularity of procedure ought not," says Sir D. Evans, "to be carried too far, and it is not desirable to rest upon a mere presumption that things were properly done, when the nature of the case will admit of positive evidence of the fact, provided it really exists." 2 Evans Poth. 336. Whether it has been adjudged that there is a valid defense to the action, before setting aside a judgment rendered at a former term of the court, should not be left to mere presumption. In *Hettrick v. Wilson*, *supra*, the court say: "As the record in this case shows no adjudication of the court upon the validity of the plaintiff's cause of action, it is difficult to see how the order vacating the judgment can be sustained." The language of the statute is explicit, that until it is adjudged that there is a

---

Railroad Company v. Hoffhines.

---

valid defense to the action in which the judgment was rendered, a judgment shall not be vacated on motion. There must be a previous adjudication that is apparent on the record, which in itself is required to embrace orders, judgments, and all material acts and proceedings of the court. Rev. Stats. § 5334. But the record in the case at bar, far from showing such previous adjudication that there was a valid defense to the action, shows that the defendant was allowed ten days, within which to file answer and make known his defense, after the judgment was set aside.

The judgment of the circuit court, and the order of the court of common pleas vacating the judgment rendered at the previous January term, must be reversed.

*Judgment accordingly.*

---

RAILROAD COMPANY v. HOFFHINES.

*Railroads—Injury to stock by—Fences—Right-of-way—Compensation therefor—Change of name of company—Proof of—How shown—Commissioner of railroads—Report of—Courts will not take judicial notice of contents.*

1. Where, in an action for damages to stock, brought against a railroad company on the ground of negligence in failing to maintain a fence between the company's right-of-way and the land of the plaintiff, the defence interposed is that in the condemnation proceeding by which the company's right-of-way was acquired, the expense of fencing was taken into account by the jury, and included in the verdict, and the company, to sustain such defence, gives in evidence the record of the proceeding, and the record is silent on the subject, no presumption arises that the matter of building and maintaining fences along the line of the railroad was considered, and compensation to the owner therefor awarded in the verdict.
2. The question whether the terms of a statute authorizing a change of name on the part of a railroad company upon the making of certain subscriptions authorized by the same act, has been complied with or not, is, where pertinent, a proper subject of allegation and proof, and courts will not take judicial notice of a statement in a report of the commissioner of railroads to the effect that the terms of the statute have been complied with, and the name of the company changed.

(Decided December 10, 1889.)

**ERROR** to the Circuit Court of Vinton County.

---

Railroad Company v. Hoffhines.

---

Action was brought by Voss Hoffhines against the Cincinnati, Washington & Baltimore Railroad Company in the Court of Common Pleas of Vinton County, to recover for the killing of two horses by a train of cars, July 24, 1885, on the line of the company's road. The alleged negligence consisted in the failure of the company to fence its road through the lands of the plaintiff, whereby the horses got upon the track. The main defense interposed was :

"That in 1853, the Marietta & Cincinnati Railroad Company was a corporation created and existing under the laws of the State of Ohio, and authorized to construct and maintain the railroad named in the plaintiff's petition, and also to enter upon any land, survey, lay down and construct said road, and to take any materials necessary to the construction and repair of the same, and to appropriate the lands and materials necessary for that purpose, according to the statute in such case made and provided, and upon such appropriation being made, to retain, own, hold and possess said materials, and to use and occupy said lands, and to hold the same for the purposes for which the same were appropriated, first paying or depositing as required by law, the amount awarded by the jury in such appropriation proceedings, as compensation and damages to the land owner by reason of such appropriation.

"That in pursuance of such authority the said company, having located its road through the enclosed lands and fields of Voss Hoffhines and William Hoffhines, and desiring to appropriate a right-of-way therefor through and upon said enclosed lands and fields of said Hoffhines, and not being able to agree with him or with any authorized agent of his, as to the amount of compensation to be paid therefor, instituted on said —day of—A. D. 1853, certain proceedings in the Court of Probate of said Vinton County for the condemnation of said right-of-way according to the statute in such case made and provided, and in such proceedings there was condemned and appropriated to the use of the said Marietta & Cincinnati Railroad Company for the purposes aforesaid, out of said enclosed lands and fields, a certain strip or

---

Railroad Company v. Hoffhines.

---

parcel of land, seventy feet wide on each side of, and along the center line of the railroad of the said company as the same was then and now located through the lands of said Hoffhines, and fifty feet wide on each side through the lands of said William Hoffhines; the said rights-of-way through the lands of Voss Hoffhines so appropriated, being the rights-of-way at the place where the plaintiff claims by his petition a fence should have been erected and maintained by the defendant, and for lack of which he claims his horses got upon defendant's track and were killed.

"That in the proceedings aforesaid the said Voss Hoffhines and William Hoffhines, by their attorney, severally claimed additional compensation or damages for said right-of-way on account of building and keeping up a fence along and upon either side of said railroad track of said railroad company through their premises; and that witnesses were introduced by and on behalf of said Voss and William Hoffhines to prove the cost of building and keeping up said fences, and compensation and damages were accordingly assessed therefor.

"And the jury by their verdict assessed the compensation and damages of said Voss Hoffhines, including building and maintaining fences aforesaid, at four hundred and ninety-eight dollars, and of said William Hoffhines at seven hundred and seventy-six dollars.

"That thereupon said company paid the amount of said verdicts, and the cost of said proceedings, and the court rendered a judgment therein to the effect that the said company should hold the said property for the said purposes for which the same was appropriated, and the said company thereupon took possession of said land and held the same for the uses and purposes aforesaid, until the year 1860, when the entire railroad of said company, including said right-of-way so appropriated at and along the place aforesaid, and of which the place named in the plaintiff's petition, where the alleged failure of defendant to fence took place, was and is a part, became and was vested in The Marietta & Cincinnati Railroad Company, as re-organized, and was thereafter owned by said re-organized company, until said entire railroad, together with said right-

---

Railroad Company v. Hoffhines.

---

of-way, and all franchises and property whatever of said re-organized company, were purchased by, and by assignment and conveyance, became vested in the defendant, The Cincinnati, Washington & Baltimore Railroad Company, in July, A. D. 1884, and was so owned by it at the time alleged in plaintiff's petition, and has been ever since so owned."

Reply was filed admitting that there was a condemnation proceeding at the time stated; admitting that the award of the jury was paid and possession taken by the company, and denying all other allegations.

At the trial the defendant requested the court to give in the charge to the jury the following proposition, viz.: "That at this lapse of time, the presumption is that in the condemnation proceedings compensation was considered and awarded for the building and maintaining of fences along the railroad." The court refused to so charge, to which the defendant excepted, and this is the alleged error here complained of.

Verdict was given for the plaintiff, and judgment rendered upon it. Error was prosecuted by the company to the circuit court, where the judgment below was affirmed. To reverse these judgments this proceeding here is prosecuted.

*W. T. McClintick and E. W. Strong*, for plaintiff in error.  
*Rannells & Darby*, for defendant in error.

SPEAR, J. The question is: Did the trial court err in refusing the request to charge?

It is insisted by plaintiff in error that the time of the trial of the condemnation proceedings there was no obligation on its part to fence its line of road because the charter of its predecessor, the Marietta & Cincinnati Railroad Company, obtained prior to the enactment of any law requiring railroad companies to fence, imposed no such burden upon it; that the organization of that company was anterior to the passage of the general incorporation act of May 2, 1852, and the company was not affected by the provisions of that act; and inasmuch as the building and maintaining of a fence between the company's right-of-way and the lands of the adjoining

---

Railroad Company v. Hoffhines.

---

owner was, under the constitutional requirement that "compensation therefor shall first be made," an element of damage proper to be taken into account by the jury in awarding compensation and damages to the land owner, it necessarily follows as a conclusive presumption, that that matter was taken into account by the jury and compensation therefor awarded in the verdict. In other words, the question of the duty of the railroad to fence at the time of the accident is *res adjudicata*, and having, by satisfying the verdict, paid the land owner for making and keeping up a fence, the negligence which caused the accident was that of the plaintiff, and the company cannot be held for the consequent damage.

For the purposes of this branch of the inquiry, it may be assumed, without holding, that the Marietta & Cincinnati Company was not organized under the act of May 2, 1852, entitled "An act to provide for the creation and regulation of incorporated companies in the state of Ohio," which makes it the duty of every company organized under it to fence its road with a good substantial wooden fence, and therefore, at the time of the appropriation, not affected by the provision above referred to. The question then is, does the record of that proceeding furnish a conclusive presumption that the expense of fencing was included in the verdict? The substance of the company's petition was that it was necessary on behalf of the company, to appropriate the lands described for the use and right-of-way of the company in the construction of its railroad, and that the company had been unable to agree with the owner upon the compensation to be paid for the appropriation by and to its use. The prayer was that the lands "may be duly appropriated for the use and purpose aforesaid, and that such proceedings may be had in the premises as may be necessary to perfect the same according to the statute in such case made and provided." No answer or other pleading was required, and none was filed, and the subject of fencing is nowhere mentioned in the record. The verdict was for a gross sum as damages by reason of the appropriation.

If it may be inferred from the record that the matter of damages by reason of a necessity on the part of the land

---

Railroad Company v. Hoffhines.

---

owner to construct and maintain a fence between his land and that of the company was necessarily determined in the proceeding; or, if the matter of fence, as an element of damage, was necessarily involved in the proceeding, as shown by the record, then the contention of the plaintiff in error is correct. No duty would devolve upon the company by reason of the statute, to maintain a fence, and the court erred in refusing the instruction asked. But, if the question of fencing might or might not have been involved in the case, then, the record being silent on that subject, no such presumption would arise. On the contrary, the duty to fence enjoined by the statute of March 23, 1859, (now sec. 3324 Revised Statutes), which provides that every railroad company having the control of a railroad operated in this state, within two years after the passage of the act or after commencing to run cars, shall construct and maintain fences on both sides of its road, would be imposed upon the company, and the instruction was properly refused. "The question is not what the court might have decided in the former action, but what it did in fact decide as shown by the judgment. A judgment is conclusive by way of estoppel only as to facts, without the proof or admission of which, it could not have been rendered." *Porter v. Wagner*, 36 Ohio St. 471.

To sustain the company's contention reliance must be had on the record of the condemnation proceeding alone. That record does not disclose the character of the land sought to be appropriated. We do not overlook the fact that in the answer in this case the company alleges that having located its road through the enclosed lands and fields of the plaintiff, and desiring to appropriate the same, and not being able to agree with the owner, instituted the appropriation proceeding, etc. But this allegation can not help out the record of that proceeding. The learned counsel, in their brief, insist that evidence at the trial "could not be allowed to contradict, or explain, or do away with, the legal effect of the condemnation proceedings." Whether, in this broad language the proposition can be maintained or not, we need not stop to discuss. Certain it is that the record itself could not be



---

Railroad Company v. Hoffhines.

---

thus enlarged, and it is the claimed conclusive effect of that record we are here considering. So that, unless it can be satisfactorily shown that the question of fencing was necessarily and always involved in all appropriation inquiries prior to the enactment of the statute requiring railroad companies to fence, it can not be conclusively presumed to have been involved in this one. No attempt has been made to show this, and we think it can not be shown. In the construction of railroads, there are many places where fences are wholly impracticable. The contour of the land may be such as to make fencing impossible, or the existence of permanent buildings just on the line may render a fence wholly unnecessary. This seems too obvious to need elaboration. It follows, as we think, that the record of the condemnation proceedings did not raise a conclusive presumption that the expense of maintaining a fence was, or might have been, taken into account by the jury in making up the verdict, and that the trial court committed no error in refusing the instruction asked.

Another question arises in the case: It was vital to the company's defense to show that neither the act of May 2, 1852, or the act of March 25, 1859, applied to the Marietta & Cincinnati Railroad Company. Every railroad organized under the former act came within its requirement as to fencing, and presumably *all* railroad companies are brought within the provisions of the latter act. The burden, therefore, was on the company to show that it was exempt from the duty imposed by those acts. It was admitted at the trial that the defendant is the successor of the Marietta & Cincinnati Railroad Company, as re-organized, and that the last named company was the successor of the Marietta & Cincinnati Railroad Company, original constructor of the railroad, and that the Cincinnati, Washington & Baltimore Railroad Company, defendant, is the owner of the rights-of-way and franchises of the Marietta & Cincinnati Railroad Company. It is now claimed in argument that the Marietta & Cincinnati Railroad Company was originally incorporated as the Belpre & Cincinnati Railroad Company by special charter, March 8, 1845, and that, by an act passed March 21, 1851, to amend the incorporation act of the Frank-

---

Railroad Company v. Hoffhines.

---

lin & Ohio River Railroad Company, and for other purposes, it was provided that upon certain subscriptions therein authorized being made the name of the Belpre & Cincinnati Railroad Company should thereupon be changed to the Marietta & Cincinnati Railroad Company; that the subscriptions were paid, and the corporate name thereupon became changed at once to the Marietta & Cincinnati Railroad Company, and it always acted and was known by that name. It is not insisted that there is any allegation, proof, or admission of this claim. Reference is made to the several acts, which show the incorporation of the roads as stated. To sustain the statement that the subscriptions were paid, and hence that the corporate name became changed at once to the Marietta & Cincinnati Railroad Company, counsel cite the report of the commissioner of railroads for the year 1870, wherein it is stated that the subscriptions were made in conformity with the statute and the name of the company changed to that of the Marietta & Cincinnati Railroad Company. The court is thus asked to take judicial notice, not only of the acts referred to, but of the statement contained in the report. If this can be done the claim is sustained; if it cannot, the claim fails, and there is nothing before the court to show when, or under what law, the Marietta & Cincinnati Railroad Company was organized. There is apparent conflict of decision in this state as to what laws will be judicially noticed, and there is at least doubt whether the act of March 21, 1851, can be so noticed. The holding in *Brown v. The State*, 11 Ohio, 277, is authority to the effect that such a law can be noticed, while the decision in *Railway Co. v. Moore*, 33 Ohio St. 384, is to the contrary. We will not here attempt to reconcile these cases. But it may be said of the earlier act, that, although it is in the form of a special law, and classed among the local laws in the yearly volume, yet it is of a public rather than private nature, inasmuch as it contains grants of sovereignty, interesting as well the community whose rights are thereby contracted, or the corporators whose rights are thereby enlarged. And assuming, without holding, that both acts referred to may be judicially noticed, there

---

Railroad Company v. Hoffhines.

---

still remains the question whether the contents of the commissioners' report can be so treated. There are certain executive documents, such as official proclamations, treaties with foreign powers, and other public documents issued by the executive or legislature, which courts will notice judicially but an examination of an extended line of authorities fails to disclose a single holding to the effect that documents similar to that of the commissioners' report may be classed among those of which judicial notice will be taken. Nor can the claim be sustained upon reason. In general, courts will judicially notice only such facts, or conclusions from facts, as are not the proper objects of evidence. Such are styled *non-evidential*. Wharton on Evidence, vol. 1, sec. 277. It can not be said that the court, from its presumptive knowledge of the law, or of public events, would have within judicial cognizance, the statement of the commissioner of railroads as to an antecedent fact. The question whether or not the statute of March 21, 1851, had been complied with, could have been put in issue in the pleadings. It would then have been a proper subject of evidence, and could have been established or disproved by any witness having knowledge of the fact. This could not be true as to matters which the court may judicially notice.

Whether or not this report would have been competent evidence, under proper pleadings, of the statement referred to, we need not inquire. Under the authority of some adjudicated cases, it would appear to be competent, while others (notably *Gordon v. Bucknell*, 38 Iowa, 438), would seem to hold the contrary. In the Iowa case the court held that the report of the register of the state land office was not competent to show that certain lands in controversy had been patented to a railroad company. However, it is not with a question of evidence we are dealing, but with a question of what courts will notice without evidence.

We are of opinion that the report cannot be resorted to by the court for a knowledge of the statement therein contained, and without it there was nothing before the court to establish that the Marietta & Cincinnati Railroad Company, existing

Gray v. Kerr.

in 1853, was the company contemplated in the act of March 21, 1851. And inasmuch as proof that this company was organized prior to the act of May 2, 1852, was necessary to the company's defence, and is not shown except by the report referred to, such defence was necessarily unavailing.

*Judgment affirmed.*

## GRAY v. KERR. .

*Partnership—Accounting between partners—When action for accrues—When statute of limitations begins to run.*

1. The obligation of a partner to account with his co-partners after the dissolution of the partnership, where there has been no fraudulent application or investment of the partnership property by him, nor agreement making him the liquidating partner, or otherwise giving him possession or control of the partnership assets, is not a continuing or subsisting trust within the meaning of Sec. 4974 of the Revised Statutes.
2. A cause of action in favor of one partner against his co-partner for an account, accrues upon the dissolution of the partnership, unless there is some agreement, express or implied, fixing a period for accounting beyond that time, or circumstances rendering an accounting then impracticable.
3. Such actions are governed by Section 4985 of the Revised Statutes, and can only be brought within ten years after the cause of action accrues.

(Decided December 10, 1889.)

## ERROR to the District Court of Belmont County.

James W. Gray, the plaintiff in error, on the 24th of April, 1878, commenced his action in the Court of Common Pleas of Belmont county to obtain the settlement of the accounts of a co-partnership theretofore existing between the parties, and to recover whatever balance might be found due him thereon. The petition states that the agreement of co-partnership was entered into in April, 1864, whereby the partners agreed to furnish, each an equal amount of the capital, and to share equally, the profits or losses of the business. The plaintiff furnished \$1,653.05 of the capital while defendant only furnished \$488.55, the latter agreeing to pay the former interest

on the difference. The business of the partnership comprised the purchase and sale of two rafts of lumber, and nothing more. The whole of the lumber was sold at a net profit of \$1,256.83. The plaintiff charges, that in May and June, 1864, the defendant drew out \$352.00 of the capital by him invested, and became indebted to the firm in the sum of \$2,330.-60; while the plaintiff's account showed him to be a creditor of the firm to the amount of \$152.43; and he avers there is due him \$1,241.02 with interest from January 1, 1867, and also interest on \$758.25 (the amount of the capital upon which the defendant agreed to pay the plaintiff interest) from June 3, 1864.

The answer admits the agreement of partnership as stated in the petition, and that the partnership terminated; and denies the other averments of the petition. The defendant also pleads the statute of limitations, in two separate defenses; one, alleging that the plaintiff's cause of action did not accrue within six years, and the other, that it did not accrue within ten years next before the commencement of the action.

The allegations of new matter in the answer were denied by a reply, and at the Spring term, 1881, by agreement of the parties, the case was referred to a referee, "to hear and determine the same, to state an account between the parties, and report his findings of fact and conclusions of law separately." On the 7th day of March, 1883, the referee filed his report in which his conclusions of fact are stated as follows: "The co-partnership was formed at the time and on the terms in the petition set forth; the capital was furnished by the partners in the amounts shown in the petition, to-wit: James W. Gray, \$1,653.05; James Kerr, \$488.55. Of the capital furnished by James Kerr, he drew out, May 19, 1864, \$350.00; June 3, 1864, \$2.00. The business stock of the co-partnership consisted of two rafts of lumber; one, bought May 9, 1864, for \$2,065.00, and one May 23, 1865, for \$1,262.50. The sale of this lumber, partly as rough lumber, and partly as dressed, constituted the partnership transactions. These sales continued, as shown by the books and evidence, until the last of the year 1865, when the partnership transactions, so far as

---

Gray v. Kerr.

---

the sales of lumber were concerned, practically ceased; the plaintiff going into another business, and the defendant continuing the lumber business. During the time of the sales of the lumber, and from that time continuously until the present, the plaintiff, by agreement and at the instance of the defendant, was the custodian of the only book in which the partnership accounts were kept, and he made the entries therein, and having no office, the book was kept at the house of the plaintiff, remote from the firm's place of business, but adjacent to the house of the defendant, the plaintiff and defendant occupying a double dwelling house during the time of the sales, and for some time subsequent. The personal and social relations of the parties were friendly until a comparatively short time before suit was brought. At the close of the sales of lumber the plaintiff had charge of the collecting and settlement of the partnership accounts for lumber sold, and continued to have charge of it until the bringing of this suit. After the close of the year 1866, no report was made to defendant of the progress of the settlement. No accounting was ever had between the parties. At or near the close of the year 1866, the defendant claims that his impression was that something would be due him. The plaintiff claims that the defendant was indebted to him, but there was no mutual understanding between them. The main difference between the parties rests on a question arising out of the sale of \$1,500.27 of lumber to Hanes & Wilson. This sale was concluded Nov. 28, 1865, and was a kind of closing out sale. It was paid for as follows: Dec. 9, 1865, check, Wheeling bank, \$200.00; May 14, 1866, check, Wheeling bank, \$1,300.27. The testimony as to which of the parties got this latter check is conflicting, and depends entirely on the parties. The check cannot be found, although search has been made for it; but the referee is of the opinion, and so finds, that the weight of testimony is in favor of, and sustains the conclusion, that the defendant got the check of \$1,300.27. The referee finds, that at the close of 1865, there were outstanding claims amounting in round numbers to the sum of \$2,600.00. Of this sum all but \$337.98 was collected during the first six months of 1866. Of this, again, \$36.40 has

not been paid, leaving \$301.58, which has been collected and settled, as follows :

1. May, 1867.....	\$50 42
2. July, 1868, cash.....	25 00
3. March 19, 1869, cash.....	14 65
4. —, 1870, settlement.....	53 40
5. June, 1871, organ.....	60 00
6. —, 1871, settlement.....	44 85
7. Dec., 1873, settlement.....	21 72
8. —, 1875.....	31 54”

“Item No. 1 is charged on the book to the defendant. The account in which it is credited has the following entry : 1867, May, by note to Kerr, \$50.42. Items 2 and 8 make up an account against one H. Helling, and the evidence is that the last item was a settlement of some dealings between the plaintiff, or another firm of which he was a member, and the said Helling. Items 5 and 7 constitute the balance due against one Jager on August 16, 1865. None of these collections were reported to the defendant, nor did he see the book until 1875 or 1876. No demand was made on the defendant for a settlement until the year 1875 or 1876. The defendant, at the time the demand was made, or a firm of which he was a member, had claims against some firms of which the plaintiff was a member, and on pressing these claims, the plaintiff claimed a balance. Some negotiations were had, but no settlement made. The referee finds that if the account is not barred by the statute of limitations, the amount due the plaintiff from the defendant would be the amount shown in exhibit “A,” hereto attached and made a part hereof. The master finds that there was no refusal to account made by the defendant until after 1876, and then, that the defendant claimed that he did not owe anything. In addition to the foregoing conclusions of fact, the referee finds that a reasonable time to collect and settle the accounts and claims of the co-partnership would be not to exceed three or four years from the termination of the sales of lumber by it. The referee concludes, as matter of law, that four years from the close of the sales was sufficient time to set

---

Gray v. Kerr.

---

the statute running. This would start it in December, 1869, and as the action was not brought until April, 1878, the referee finds, as a conclusion of law, that the plea of the statute of limitations is sustained by the evidence, and that the action of the plaintiff was barred before it was commenced. As a further conclusion, the referee concludes that the defendant is entitled to a decree dismissing the bill of the plaintiff with costs of suit.

Exhibit "A" referred to in the report is as follows:

"If the claim is not barred by the statute of limitations, the master would find the amount due plaintiff from the defendant to be eleven hundred and one dollars and twenty-eight cents (\$1,101.28), with interest on seven hundred and fifty-eight dollars and twenty-five cents, from June 3, 1864, and on the balance thereof, from the first day of January, 1867."

Neither party excepted to the referee's report. At the next term of the court after it was filed, the plaintiff moved for judgment in his favor, upon it, which motion the court overruled, and rendered judgment for the defendant. The plaintiff excepted, and prosecuted error to the district court to reverse the judgment, solely on the ground that the court erred in overruling his motion, and rendering judgment for the defendant. The judgment was affirmed by the district court, and the plaintiff seeks by this proceeding to reverse the judgments of the district and common pleas courts.

*J. C. Gray*, for plaintiff in error.

*L. J. C. Drennen*, for defendant in error.

WILLIAMS, J. Was the plaintiff's action barred by the statute of limitations? If it was, there is no error in the judgments of the courts below. If it was not, the plaintiff is entitled to judgment upon the report of the referee.

The original action was one, that before the adoption of the code of civil procedure, was known as a suit in equity for an accounting between co-partners; and much of the discussion of counsel, has been directed to the rules applied in courts of equity, to defenses founded on the



lapse of time. Those courts, it is admitted, were not always agreed, either upon the ground on which such defenses were sustained, or in regard to the length of time necessary to make them available. Some, adopted by analogy, the statutes of limitations applicable to similar actions at law, and others, the more general rule, that nothing short of such laches, as, from loss of papers, death of parties, or witnesses, or other circumstances, prevented a just settlement, would bar the action. The referee in the case, reports as his conclusion of law, that there is no certain rule, "as to when the limitation will prevail in equity;" and he decides that under the circumstances of the case, "four years from the close of the sales, was sufficient time to set the statute running," and the action, not having been commenced for more than six years thereafter, was barred. Since the distinction between suits in equity and actions at law has been abrogated, and the civil action substituted for them, by the code of civil procedure, its provisions limiting the time for commencing actions, apply to all civil actions, whether they be such as were theretofore of a legal, or equitable nature, and must furnish the guide, in determining whether the plaintiff's action was barred.

The plaintiff in error contends, however, that the action is expressly saved from the limitations of the statute, by sec. 4974, (Revised Statutes,) which provides that the chapter prescribing the time within which actions may be commenced, shall not apply to the case of a continuing and subsisting trust. His position is, that a trust relation subsists between the co-partners after the dissolution of the firm, as well as before; that notwithstanding the dissolution, the partnership may be said to continue, with all the incidents pertaining to that relation, for the purpose of settling its affairs, and, until that is accomplished, each partner is a trustee for the other. In support of this position, we are referred to the case of *Pomeroy v. Benton*, 57 Mo. 531. That was a case "Where one member of a firm who had the entire management of the partnership, without the knowledge or consent of his co-partner used the money, assets and credit of the concern in outside speculations,

---

Gray v. Kerr.

---

and appropriated the benefits to himself individually, and subsequently rendered to his co-partner a false balance sheet, purporting to correctly exhibit the true condition of the firm affairs, but which in fact did not mention or allude to the outside operations, and assured his co-partner that this statement was correct, and on the faith of this statement and his representations his partner was induced to convey to him all his interest in the concern, and to execute a bill of sale therefor;” and it was held, that “outside of any stipulations in the partnership articles, good faith should restrain one partner from embarking the funds or credit of the firm outside of their legitimate scope, and for his own advantage; and if such ventures are made by one partner, he cannot appropriate the profits to himself, but must account for them to the partnership.” It is said by the judge who delivered the opinion in the case, “That every partner is the agent of his co-partner is a very familiar doctrine, and it arises from the necessities of his co-partnership relation. A doctrine equally well settled, though not yet hackneyed through frequent quotation, is, that *the same rules and tests are applied to the conduct of partners as are ordinarily applicable to that of trustees*; and that the duties, functions, rights and obligations of partners may be for the most part comprehended by the same words which define those of *trustees and agents*.” And he cites *Kelly v. Greenleaf*, 3 Story R. 93, where it is held, that “Where a partner fraudulently, without the consent of his co-partners, applies the partnership funds to his private purposes and profit, or invests the same in his own name and for his own use, his co-partners may, if they can distinctly trace the investment, follow it, and treat it as trust property held for the benefit of the firm, by the partner or by any person in whose hands it may be, except a bona fide purchaser, without notice.”

There is another class of cases which hold, that a liquidating or surviving partner, who becomes possessed of the partnership assets, is a trustee for their proper application to the firm creditors, and, he is bound of course, to distribute to the co-partner, or his representative, his share of any surplus remaining after the discharge of the partnership liabilities. In

such case, the surviving or liquidating partner is acting for all the partners, and his possession is not adverse, until a renunciation by him, or so long as the postponement of a final settlement is consistent with a faithful discharge of his duties. It was said by Lord Chancollor Eldon, that a partner, who after dissolution has the actual possession of the partnership property, has it clothed with a trust for the co-partners, to apply the property to the partnership debts. *Williams Ex Parte*, 11 Vesey Jun. 5. The obligation, however, of the liquidating or surviving partner, to account for the surplus, after the partnership liabilities are discharged, is not that of a trustee, but of a debtor.

No authority is found in these cases, nor in any to which we have been referred, upon which it can be maintained, that a partner who has neither been guilty of a misapplication of the partnership assets, nor had possession or control of them after dissolution, as liquidating or surviving partner, or otherwise, is in any sense a trustee of his co-partner; and no ground for such a claim is perceived. Nor do we think a trust relation exists between partners generally after dissolution, where there has been no agreement, and no concealment or fraud. 2 *Bates Partnership*, sec. 942; *Pierce v. McClellan*, 93 Ill. 245; *McKelvey's Appeal*, 72 Penn. St. 409; *Jenny v. Perkins*, 17 Mich. 28; *Collier on Part.*, 6th Ed., sec. 297, note 6. It has long been the established doctrine of courts of equity, that subsisting trusts are not within the operation of statutes of limitation, and suits to enforce them are not barred by lapse of time; and yet it is said by most writers on the law of partnerships, to be well settled, that suits for accounting between partners are subject to the bar of the statute, or to limitations analogous to the statute. 2 *Bates on Part.*, sec. 942; *Story on Part.*, 7 Ed. sec. 233, note 4. *Pierre v. McClellan*, 93 Ill. 245; *Collier on Part.*, 6th Ed., sec 297, note 6.

There is nothing in the circumstances of this case upon which to ground a trust in favor of the plaintiff. No partnership property came to the defendant's possession after the dissolution, and he was not charged, by any agreement, with the

duty of collecting the debts due the partnership, nor did he in fact collect them. It appears from the report of the referee, that the only book pertaining to the partnership business, was kept by the plaintiff, and retained in his custody after the termination of the partnership; and, that he had charge of the collection and settlement of the firm accounts. Nothing came to the hands of the defendant after the dissolution, except the sum of \$50.42 in the month of May, 1867, and this was entered on the book by the plaintiff at that time; and all other charges against the defendant, were by the plaintiff, entered on the book prior to that time.

The plaintiff's action, is therefore, subject to the limitations prescribed for commencing civil actions, and, since such actions can only be commenced within the period prescribed after the cause of action accrues, it becomes important to determine when, in cases of this kind, the cause of action accrues. The contention of the plaintiff in error is, that the right of action does not accrue until all the partnership claims have been collected, and its liabilities discharged; and authorities are found which support this position. But the generally accepted, and we think the better rule, is, that the right of action is complete, and the statute begins to run, when the partnership is dissolved, unless there is some agreement fixing a period for accounting beyond the time of dissolution, or circumstance that renders an accounting then impracticable. In a recent and excellent work on the law of partnerships, the author speaking on this subject says: "Any partner after dissolution, or if there has been no dissolution, but he has grounds to seek it, can maintain a bill for an accounting, although he is a debtor partner, and no balance will be coming to him, for he has a right to have the assets applied to the debts, to ascertain and reduce his ultimate liability. And though the losses have been caused by his violation of agreement, to the extent of requiring them to fall upon himself." *Bates on Partnership*, sec. 921.

In *Collier on Partnership*, sec. 282, it is said: "The account which a court of equity decrees between partners is usu-

ally consequent upon a dissolution, and Lord Eldon was inclined to hold that it *must* depend upon a dissolution."

Mr. Parsons in his work on partnership, on page 326, says, "a court of equity frequently decrees an account between partners; almost always, however, where there has been or is to be a dissolution of the partnership." And again, on page 554 of the same work, it is said: "Whenever there is a dissolution of a partnership, for any cause, it would seem that there must be an account, if it be demanded by any party in interest. But it is always possible for partners or their representatives to agree together upon some arrangements which render an account unnecessary." In Wood on the Limitation of Actions, that author, speaking of the application of the statute of limitations to actions for an accounting between partners, says: "There is no definite rule of law that the statute begins to run immediately upon the dissolution of the partnership, and the question as to whether it does or not, must depend upon the peculiar circumstances of each case. But unless there is some covenant or agreement, express or implied, fixing a period for accounting beyond the time of dissolution, or circumstances that render an accounting impossible, the statute begins to run from the time when the partnership is in fact dissolved." Wood on Limitation of Actions, sec. 210. And further on in the same section, it is said, "Where partnership affairs are unsettled at the time the firm is dissolved, and by written agreement one of the partners is designated to keep and dispose of the firm assets at such prices and upon such terms as he can, a continuing trust is thereby created, and the statute does not begin to run in *favor of the liquidating partner*, so long as he acts under the trust, or admits its continuance."

The essential allegations of a petition, in the ordinary case for the settlement of a partnership, are, the fact of a partnership between the parties, the transaction of partnership business by them under it, its dissolution, and unsettled accounts growing out of it. These facts appearing, the petition is not demurable. The judgment under the code in such cases, is as flexible as the former decree in chancery, and may

---

Gray v. Kerr.

---

be sufficiently comprehensive to determine the ultimate rights of the parties. It may provide for the sale or other disposition of any remaining assets of the copartnership; the collection of outstanding claims, and the payment of any unsatisfied partnership liabilities; and, then, settle the rights of the parties concerning any surplus of the partnership assets, or reserve their settlement for future adjudication. There was, in this case, no agreement postponing the accounting beyond the dissolution of the copartnership, nor other circumstance rendering an accounting then impossible or impracticable. No charge is made, that the defendant employed the partnership assets for his individual advantage, and there is no imputation of fraud or concealment on his part. Nor was the defendant, in any sense, a liquidating partner. It appears from the report of the referee, that the partnership business terminated at the close of the year 1865, when, the plaintiff went into other business for himself, and defendant did likewise. There was, at that time, it is true, no express agreement of dissolution, but a partnership may be terminated and dissolved by the completion of its business, and this partnership was then in fact dissolved. At the time of the dissolution there were outstanding claims due the firm, all of which, except a small amount, were collected by the plaintiff within less than a year, and nothing was received by the defendant subsequent to May, 1867. It is not shown that there were any unpaid liabilities of the firm, and no reason appears why the action could not have been commenced immediately after the dissolution; from which time in this case, the statute of limitations began to run.

The only remaining question is, what period of time will bar the action? A majority of the court are of the opinion that actions of this class are governed by the provisions of section 4985, (Rev. Stats.) and can only be brought within ten years after the cause of action accrues; and, as more than that period elapsed between the dissolution of the partnership and the commencement of the plaintiff's action, the courts below properly held that the action was barred.

*Judgment affirmed.*

## LEWIS ET AL. v. LAYLIN ET AL.

46 663  
55 476

*Records of inferior tribunals—How construed—Two-mile assessment pike law—Authority of county commissioners under—Extends to roads within municipal corporations—Practice—What proper procedure to correct errors in proceedings of county commissioners.*

1. (a) In construing the records of inferior tribunals, acting within the scope of their authority, to ascertain whether or not they have followed certain statutory requirements, technical precision will not be required; it will be sufficient if it appear, though informally, from a reasonable construction of the whole transcript of the proceedings, that these requisites have been observed.
- (b) Where the transaction is one extending over a considerable period of time, and requires acts to be done and orders made on different days, it is not essential that the entry recording each separate act should be complete in itself, for it will be aided, if possible, by construing it in connection with what has been already recorded or embodied in written orders that are part of the transcript.
2. (a) Where county commissioners, in the course of 'proceedings had before them under the two-mile assessment pike law, have before them and are considering the reports of the viewers and surveyor, which recommend the improvement to be made, and which also name the lots and lands that will be benefited by the improvement and ought to be assessed therefor, an order made by them directing the improvement to be "made in accordance with the report of the viewers and surveyor," is a sufficient stating of the lands which shall be assessed to pay the expense thereof.
- (b) Where the notice to the apportioning committee of their appointment states that they have been "appointed as a committee to apportion the estimated expense thereof (of the improvement) upon the real property embraced in the *order aforesaid*," and directs them to apportion the same "according to the benefits to be derived therefrom;" and a list of the lots and lands made by the viewers and surveyor is attached to the notice, it is to be regarded as part thereof, though the notice, proper, does not, in direct terms, make it so, nor expressly refer to this list.
- (c) Where the report of the apportioning committee shows that they acted under this notice, and returned to the auditor and commissioners a list of the lots and lands they had assessed, and the respective sums assessed on each, it will be presumed, in the absence of any evidence to the contrary, that they followed the law and their instructions in the mode of making it.
3. County commissioners have authority under the two-mile assessment pike law to improve a state, county or township road, although the

---

*Lewis et al. v. Laylin et al.*

---

improvement embraces that part of the highway which lies within the limits of a municipal corporation.

4. An action does not lie to enjoin the collection of an assessment made under the two-mile assessment pike law, on account of defects or irregularities apparent on the proceedings had before the county commissioners to cause the improvement to be made; the appropriate remedy for such defects and irregularities is by petition in error (*Haff v. Fuller*, 45 Ohio St. 495).

(Decided December 10, 1889.)

### ERROR to the Circuit Court of Huron County.

This action was brought in the Court of Common Pleas of Huron County against the commissioners, auditor, treasurer and surveyor of the county, to enjoin the collection of a tax that had been assessed under the provisions of the two-mile assessment pike law. The plaintiffs set forth in their petition as grounds for relief certain alleged irregularities that appeared upon the face of the proceedings instituted and carried on before the county commissioners to secure the proposed improvement, as well as certain others which did not so appear, and which, if denied, must have been established, if at all, by proof. The answer of the defendants denied that there were errors or irregularities, either upon the face of the proceedings had before the commissioners, or in any other respect. The case was carried to the circuit court by an appeal from the judgment of the court of common pleas, and, upon the trial in the former court, the facts were found and stated separately from the conclusions of law. This finding of fact contains and brings into the record, now before us for review, the entire proceedings had before the commissioners to establish the improvement and levy the tax now sought to be enjoined; and as it negatives the existence of any other errors or irregularities than those which do so appear, no others, if any existed, are presented by the record.

The pleadings and finding of facts disclose that on Aug. 11, 1884, a petition was filed, signed by more than five freeholders of the county, asking to have graded and graveled, under the two-mile assessment pike law, a free turnpike from a point



within the city of Norwalk, eastwardly about three miles; that the petition was accompanied by a proper bond; that such proceedings were had upon this petition, notwithstanding an earnest and vigorous remonstrance on the part of a large number of the defendants in error, that the prayer of the petition was granted, the improvement ordered, two sections of it completed and accepted by the commissioners, and the third (and last) one nearly finished, and that over \$20,000 of the county bonds had been sold to pay for the work done by the contractor before this action was commenced. Any further statement of facts necessary to a decision of the case will be stated in the opinion of the court.

*Chas. E. Pennewell and L. C. Laylin*, for plaintiffs in error.  
*Doyle, Scott & Lewis*, for defendants in error.

BRADBURY, J. That the commissioners had jurisdiction of the proceedings prosecuted before them to establish the improvement, is shown by the finding of the court, provided they had authority to improve that part of the highway which extended into the corporate limits of the city of Norwalk.

The finding of the circuit court in respect to both law and fact is full and complete, and presents the questions in contention between the parties here with unusual clearness. To some of these findings the plaintiffs below excepted, and counsel in argument refer to them; but, as no cross-petition in error has been filed in the case, they are not before us for consideration. Of the findings of the circuit court, to which defendants below excepted, it will only be necessary to consider those which relate to the third conclusion of law, and to the last clause of the finding of fact, as, in the view taken by this court, they are decisive of the case.

The third conclusion of law is, "that the order made by said commissioners of Sept. 20, 1884, was invalid for the reasons:

"1st. Because, in said order for said improvement, the commissioners did not state or determine the lots and lands to be assessed for the costs of said improvement.

---

Lewis *et al.* v. Laylin *et al.*

---

"2d. Because the report of said apportioning committee does not find or determine the proper proportion of the costs and expenses of said improvement, chargeable for special benefits arising from said improvement, conferred upon the lots and lands assessed for the expenses thereof.

"3d. Because the said commissioners had no power or authority to order the improvement of a portion of one of the streets of the city of Norwalk."

In determining the sufficiency of the records of inferior tribunals and public boards, to express their purposes or to preserve a memorial of their transactions respecting matters within their jurisdiction, technical precision should not be required; on the contrary, they should be liberally construed. They are not usually drawn by persons possessed of professional knowledge or skill in such matters; the law does not contemplate that such tribunals or boards shall be constantly attended by persons having such knowledge or skill, but, rather, that their duties will be performed, at least, generally, without such assistance. To subject them to the test of technical precision, would, in most instances, at least, defeat the object sought to be attained by the legislature in creating inferior tribunals and public boards; and, therefore, however informal their records may be, if enough appears to show with reasonable certainty that the requirements of the law have been substantially complied with, their proceedings should, upon grounds of public policy, if for no other reason, be sustained. *Harding v. Trustees*, 3 Ohio, 227; *Humiston et al. v. Anderson's Adm'r*, 15 Ohio, 557; *Barto v. Abbe*, 16 Ohio, 408; *McClelland v. Miller*, 28 Ohio St. 488, 498; *Lima v. McBride*, 34 Ohio St. 338. Nor should their proceedings be attacked in detail, and an entry or an order separated from the balance of the record, and if found incomplete when considered alone, the proceedings declared erroneous; instead, the whole is to be construed together, and, if from the entire record it appears that all the statutory steps have been substantially taken, the proceedings should be upheld. These principles we adopt and apply in construing the record of the county commissioners in the case now under consideration.

The order of the commissioners, made September 20, 1884, does not, in direct terms, state or determine the lots and lands to be assessed for the cost of the improvement, nor does it directly refer to and make the report of the viewers, which does so state and determine, a part of this order; and, therefore, if technical precision on this point is necessary, the order was defective. But, if it may be considered in connection with what has transpired before, and the nature of the proceeding, how will it stand? An examination of the proceedings will show that the commissioners, on August 11, 1884, appointed viewers and directed a notice to be given to them prescribing their duties under the appointment. This was done, and, among other duties, it required them to ascertain and report "*the lots and lands which will be benefited thereby and ought to be assessed for the expense of the same.*" The viewers met, performed their duties, and on September 13, 1884, reported in writing, to the commissioners, their action in the premises, and, in addition to other things, the report, respecting the matter now in review, was as follows: "We submit herewith a list of the *lots and lands* which will be benefited thereby, and ought to be assessed for said improvement." Here follows a list of the lots and lands, with owners' names arranged in alphabetical order, showing the range, township, section and lot, in which the lot or land to be assessed is situated, and a short description of the number of acres in each. Accompanying this report was a plat, profile and specification of the improvement, made by the surveyor who attended the viewers, which was treated and considered as a report by him. The record of the commissioners shows, that on September 13, 1884, this report of the surveyor, together with that of the viewers, was duly filed with them, and that, "said reports having been publicly read and carefully considered, \* \* \* the matter was postponed one week, to enable the board to know the number of land owners who were signers to the petition." The week expired September 20, 1884, and on that day the commissioners made the order for the improvement, which is

claimed to be defective in not naming or determining the lots and lands to be assessed. It is in the following words:

“Whereupon, the consideration of the report of the viewers, in the matter of the Hawes two-mile assessment pike, was resumed; and the board being satisfied that more than a majority of the resident land owners of the county, whose lands are reported benefited, and ought to be assessed, had signed the petition, on motion of Mr. Simmons, it was ordered that said improvement be made in accordance with the report of the viewers and surveyor.”

It is true this order does not, in terms, name the lots or lands to be assessed to pay the cost of the improvement; but, when the nature of the proceeding before the commissioners is considered; that the scheme of the improvement contemplated that its cost should be assessed exclusively upon the lots and lands to be benefited thereby; that one of the main objects to be accomplished by appointing the viewers and surveyor, and the duty enjoined upon them by the statute under which they acted, was to ascertain and report, for the information of the commissioners, and as a basis for their order directing the improvement to be made, the lots and lands to be benefited thereby, and which ought to be assessed to pay the cost thereof; that this duty had been performed, and their report in respect thereof was then being considered by the commissioners, and in fact, contained a statement of the lots and lands that in their opinion should be assessed, an order made by that board, directing the “improvement to be made in accordance with the report of the viewers and surveyor,” must be regarded as adopting the language and recommendations of the report, as fully and completely as if it had been formally copied into the order. We hold, therefore, that this order, of September 20, 1885, did state and determine the lots and lands to be assessed for the cost of the improvement.

The second reason given in the special finding, for holding as matter of law, that the order of September 20, 1884, was invalid, is, “Because the report of the apportioning committee does not find or determine the proper proportion of the costs

and expenses of said improvement chargeable for special benefits arising from said improvement, conferred upon lots and lands assessed for the expenses thereof."

In this connection it becomes necessary to refer to the eighth finding of fact. This finding shows that the order of the commissioners, appointing the apportioning committee, was as follows :

" Ordered that Captain C. Woodruff, Homer Clary and Charles Whitney be appointed the apportioning committee, under section 4842, Revised Statutes, to apportion the expense of said improvement on the property benefited, and that said committee meet on Monday, September 29, 1884, and proceed with the duties of their appointment." This referred directly to the statute under which the apportioning was to be done, and made certain the duties which the commissioners contemplated and intended the committee to perform. Notice, pursuant to this order, was duly given to the apportioning committee, directing them, among other things, as follows: " You will, therefore, proceed, forthwith, upon actual view of the premises, to make out said apportionment, according to the benefit to be derived therefrom, and report the same to the county auditor." And there was attached to this notice a copy of the list of lots and lands, which the viewers and surveyor had reported as benefited by the improvement and ought to be assessed to pay the costs thereof. While neither the order of the commissioners now under consideration, nor the notice to the apportioning committee, directly refers to this list of the lots and lands to be assessed, yet, from the nature of the proceedings, the entries, orders and reports before referred to and set forth in this opinion, and the reference made to the statute, (sec. 4842, Rev. Stats.) by the order itself, it is entirely clear that the commissioners had in view the lots and lands named in the list when they made the order now under review; and it is equally clear, from the language of the order to the apportioning committee, and the duties devolved upon them under it, that this list of lots and lands, together with the order, constituted but one document.

---

*Lewis et al. v. Laylin et al.*

---

They were fastened together, and in that condition delivered to the apportioning committee. Why this physical joining together? Why attach this list of lots and lands, if they were not those upon which the assessment was to be made? It was done by the county auditor, who is the clerk of the commissioners respecting these matters. He was performing a public duty. Some purpose was to be accomplished by it, certainly; and what other purpose could the attachment of this list accomplish, except to point out to the apportioning committee, the lots and lands to be assessed to pay the expenses of the improvement? No other list of them was made part of the notice. The apportioning committee had no power to determine what lands should be assessed. The notice, without the list, was, upon its face, an incomplete instrument, in that it did not state the lots and lands that ought to be assessed. The list alone, had no significance; but together they constituted a complete document, that pointed out in unmistakable terms the duties which it imposed upon the committee. We, therefore, hold, that the list of lots and lands attached to the notice was a part of it.

When it is shown that the list of lots and lands that the viewers and surveyor reported as benefited by the improvement, and ought to be assessed to pay the costs thereof, was properly a part of the notice given to the apportioning committee, their duties thereunder clearly appear. They were to apportion the cost of the improvement to the lots and lands, named in the list, according to the benefits to be derived therefrom, and report the same to the county auditor. They proceeded under the notice, made an apportionment of the costs to the lots and lands named in the list, and reported as follows, to-wit:

"We, the undersigned committee, appointed by your honorable board to apportion the estimated expense of the improvement of a two-mile assessment pike road in Norwalk Township, as petitioned for by O. M. Hawes and others, upon actual view of the premises, would respectfully report the following list of lots and lands, with the respective sums assessed on each, as follows:"

Then follows a list of lots and lands assessed by the committee, with the amount assessed against the same. This list was the same list accompanying the auditor's notice to the apportioning committee. This report does not state that the committee made the apportionment according to benefits, nor does it state that they did not; it is silent in respect thereto. The instructions embodied in the notice of their appointment, as well as the statute (Sec. 4842 Rev. Stats.) under which they acted, pointed out, in unmistakable terms, the manner in which the apportionment should be made. They were in the performance of a public duty, and the presumption is, in the absence of any contrary indication, that they did it in a lawful manner. *Coombs et al. v. Lane*, 4 Ohio St. 112; *Reynolds et al. v. Schweinefus*, 27 Ohio St. 311; *Titus v. Lewis*, 33 Ohio St. 304. We think, therefore, that the transcript of the proceedings had before the commissioners, when examined according to the principles adopted by this court, sufficiently shows that the apportioning committee did find and determine the proper proportion of costs and expenses chargeable for special benefits conferred upon the several lots and lands assessed therefor.

The third reason assigned, in support of the third conclusion of law, presents the question of the power of the county commissioners to improve a state or county road when it is also a street of a municipal corporation; and to the discussion of this interesting and important question counsel have devoted a considerable part of their very able briefs; and, counsel for defendants in error, have, with great force, pressed upon the attention of the court the mischief that might arise from a conflict of jurisdiction, if it should be held that the county commissioners have the power contended for. This argument is not without force, and in a doubtful case might determine the construction to be placed upon the provisions of a statute.

That a state or county road is not extinguished by becoming a street of a municipal corporation is clear. It retains its character of a state or county road, even as to such portions of it as may chance to fall within the limits of a municipal corpora-

---

*Lewis et al. v. Laylin et al.*

---

tion, that may be subsequently organized; nor is this character changed because the municipal authorities call it a street and give to it a name as such, and are invested by law with its general control. Should the municipality cease to exist, the highway would at the same time cease to be a street, but it would not cease to be the state or county road which it was originally.

If so apparent a proposition requires support from authority, enough will be found in the case of *Bisher v. Richards*, 9 Ohio St. 485, where it was held, that the laying out of a state road over a county road did not extinguish the latter,\*but that both might co-exist. If that is so, upon the same principle, a state or county road would continue to exist after its adoption by a municipal corporation as a street.

It has also been held in this state, that under a statute giving the commissioners general power to lay out and establish county roads, they were authorized to lay out and establish a county road *within or through* an incorporated town or city. *Wells v. McLaughlin*, 17 Ohio, 99. Also, one "whose *termini* are *wholly* within the limits of an incorporated town or city." *Butman v. Fowler et al.*, 17 Ohio, 101. These cases establish the doctrine, that territory, within a municipal corporation, is not exempt from the operation of general laws giving authority to county commissioners respecting public highways.

The statute under which the commissioners were acting, in the case under consideration, is a general one, and reads as follows:

"Section 4829. The county commissioners of any county shall have power, as hereinafter provided, to lay out and construct any new county road, or improve any state, county, or township road, or any part thereof, or any free turnpike road, or any part thereof not completed, by straightening or altering the same, and by grading, paving, graveling, planking, or macadamizing the same, and by draining the same in any direction required to make the most convenient and sufficient outlet; and for such purpose they may, upon further petition, when by them deemed expedient, vacate any state, county, or township road, or any part thereof, or any free turnpike road,



or any part thereof not completed, and may improve several roads, or parts of roads, or free turnpike roads or parts thereof not completed, when the same may be united in one continuous road improvement."

The power conferred by this section is as full, ample and general, as that conferred by the statutes under which the commissioners were acting in the cases of *Wells v. McLaughlin* and *Butman v. Fowler*, *supra*, where it was held that the power of the county commissioners did extend to and authorize them to lay out and establish public roads within incorporated towns and cities. Therefore, unless this power is limited by some other statutory provisions, the commissioners had authority, under the statute above recited, to make the improvement in question. This construction is strengthened by the proviso added in 1884, (81 Ohio Laws, 56) to sec. 4831 of the same act, which reads as follows:

"Provided, that in locating such improvement within the territorial limits of any incorporated village or town, the engineer and viewers shall be confined to the platted streets of such village or town."

And by section 4850, as amended in 1882 (77 Ohio Laws 50):

"When any road to be improved under and by virtue of this chapter begins or terminates in a city or village, the corporate authorities thereof may, upon the recommendation of the county commissioners, if they deem the same expedient, agree to pay in the bonds of such city or village, in the manner and proportions described in section 4846, in addition to any amount that may be assessed upon the real property within such corporation by virtue of the provisions of this chapter, an amount not exceeding one-fifth of the entire cost of the road; but the entire tax to be imposed for road purposes, by virtue of this section, shall not in any year exceed five mills on the dollar of the taxable property in the corporation."

This section and proviso clearly show the construction intended by the legislature. In addition to this they adopted the

---

*Lewis et al. v. Laylin et al.*

---

general language employed in sec. 4829, Rev. Stats., after such general terms had received a judicial construction, in the cases of *Wells v. McLaughlin* and *Butman v. Fowler*, *supra*, that brought within the jurisdiction of county commissioners proceedings to establish state and county roads within the limits of municipal corporations; and are presumed to have had that construction in mind when legislating subsequently upon the same general subject.

In the sections of the municipal code, which bear directly on the subject of street improvement, no words excluding this power of the county commissioners are found, nor are there any direct words of exclusion in sec. 2640, Rev. Stats. That section reads as follows:

“The council shall have the care, supervision and control of all public highways, streets, avenues, alleys sidewalks, public grounds and bridges within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance.”

But it is contended that the general power conferred on municipal corporations by this section, and the special power to improve streets given by other sections of the municipal code, are incompatible with the existence of authority in the county commissioners to improve that portion of a state or county road which may lie within the corporate limits. If this contention is true it becomes a matter for the most careful consideration to determine which authority must yield to the other; and in that view it might be important to cast up the advantages on the one hand and the evils on the other, incident to such construction, and ascertain upon which side the balance stood; upon the theory that the legislature must be taken to have intended to promote the public welfare, and therefore intended that to be the law which would best accomplish it. But is there any such incompatibility? That there is some danger of a conflict of authority between the county commissioners and the municipal council, where both have power to improve the same highway, can not be denied. That is a danger that always exists where two independent officers or bodies have a concurrent authority over the same

subject; yet, in many instances, there are other considerations that override this objection, and the concurrent authority is given. This is a question of public policy, to be considered and determined by the legislature alone.

It is true that sec. 2640, in very general terms gives to municipal councils the "care, supervision and control of all public highways, \* \* \* within the corporation." The power conferred by this section is full and ample; but it contains no words directly excluding that conferred by the statute upon county commissioners. If it has that effect, it amounts to a repeal of the latter statute by implication. Repeals of this kind are not favored.

The duty of the court is to consider all the statutes upon the subject together, and, if possible, uphold all of them, and give due force and operation to every part of each. We discover no difficulty in doing this in the case before us. The legislature, by the provisions of sec. 2640, Rev. Stats., bestowed a very general control over the highways within municipal corporations, but, at the same time, they have preserved to the county commissioners a power to improve those public highways which are a part of the general road system of the county, though they may happen to lie partly within the limits of the municipality.

As we hold the proceedings before the commissioners to be in substantial compliance with the statutes under which they were had, and that they had power to improve that portion of the state road which fell within the city limits, it follows that the assessments were all valid, and any discussion of the doctrine of estoppel becomes unnecessary; and we do not care to add anything to the thorough statement of the principles of the doctrine to be found in *Tone v. Columbus*, 39 Ohio St. 281.

The questions considered in this opinion are presented by the record, and were of sufficient importance to require a decision directly upon them, though the case might have been decided upon the ground that, as the parties had a remedy at law, they could not invoke the aid of equity.

---

*Lewis et al. v. Laylin et al.*

---

The action was brought, nominally, to enjoin the collection of an illegal assessment; but whether it had been illegally assessed or not, depended upon the jurisdiction of the county commissioners over the subject matter; and, if they had such jurisdiction, then upon the regularity of the proceedings had before them. These proceedings could have been reviewed by petition in error, under sec. 6708 Rev. Stats. and relief had against any error apparent on their face. *Haff v. Fuller*, 45 Ohio St. 495; *Burrows v. Vandevier*, 3 Ohio 383; *Ferris v. Bramble*, 5 Ohio St. 109; *Beebee v. Scheidt*, 13 Ohio St. 406; *Coms. v. Jenkins*, 19 Ohio St. 348; *Farvert v. Finfrock*, 43 Ohio St. 335.

The principle decided in *Haff v. Fuller*, *supra*, applies equally as well to proceedings before county commissioners under the two-mile assessment pike laws, as to proceedings before township trustees under the ditch laws. In that case the action was directly to enjoin the construction of the improvement (a ditch), while in the case before us it was to enjoin the collection of an assessment to pay its costs, which latter action is authorized by chapter 13 of the Code of Civil Procedure; but, in either case, it was the jurisdiction of the board and the regularity of the proceeding had before it, that were challenged; and the right of the party to do this in equity, cannot depend upon his lying by until the improvement is substantially completed, and then seeking to accomplish by its aid what he could have done by a proceeding in error. The rule is laid down in 43 Ohio St. 497, as follows: "As a result of the rule that courts of equity do not entertain jurisdiction for the enforcement of rights or the prevention of wrongs, when the legal tribunals are capable of affording redress, it is always a sufficient objection to the granting of an injunction, that the party aggrieved has a full and adequate remedy at law. In the application of the rule it is accordingly held, that courts of equity will not sit as courts of error, to revise and correct proceedings at law or grant injunctions against judgments, because of errors in the proceedings, when proper relief can be had in the ordinary

---

The State *ex rel.* v. Foraker, Governor.

---

courts of appellate procedure." The omissions and irregularities, held by the circuit court to be errors invalidating the proceeding had before the county commissioners, were all apparent on their face, and for their correction there was provided a legal remedy by petition in error, and they were not proper predicates for equitable relief.

*Judgment reversed and the petition of the plaintiff dismissed.*

---

THE STATE EX REL. v. FORAKER, GOVERNOR.

*Constitutional amendment—Number of votes necessary for adoption.*

An amendment to the constitution, submitted by the legislature under the provisions of section 1, article 16 of that instrument, requires, for its adoption, a majority of all the votes cast at the election for senators and representatives at which it is submitted to the electors of the state for their approval or rejection.

(Decided December 17, 1889.)

IN MANDAMUS.

*David K. Watson*, Attorney-General, for the respondent.  
Brief in support of the demurrer.

It will be observed that the constitution does not say that amendments shall be submitted to the electors for their approval or rejection, at a *special election* held for that purpose; but it does say, that they shall be published for six months *preceding the next election for senators and representatives*, at which time the same (that is, the amendments) shall be submitted to the electors for their approval or rejection; and if a majority of the electors voting *at such* election, etc. All this means that the amendments are to be voted for at the same time at which the election is held for senators and representatives; and there was good reason for selecting such an election, as the time when so important an act as changing the organic law of the state should be voted upon, for the gravest and most important power which the electors of a

---

The State *ex rel.* v. Foraker, Governor.

---

state can exercise, is the power to change the fundamental law which governs them, and it should always be exercised at a time when it is most probable that a large vote could be obtained. The framers of the constitution knew that the electors of the state would take a deeper interest in the election for senators and representatives, than any election which they held, for senators and representatives constitute the law-making power of the state, the legislative department of the state government; and therefore, represent interests that lie nearest to the people; and it was for this reason that the convention which framed the constitution, provided that amendments to that instrument should be submitted for approval or rejection at an election when such officers were voted for, in order that the fullest expression of opinion might be obtained upon their adoption or rejection.

It will not be claimed that there was a separate ballot-box, into which were cast the ballots containing the words "Biennial Elections—Yes," or "Biennial Elections—No," or separate judges to receive and count the ballots so cast, or separate clerks to record such ballots. On the other hand, it will be conceded that the judges were the same, the clerks were the same, the poll-books and tally-sheets were the same, and, in fact, there was nothing to indicate that the proposed amendments were not to constitute a part of the one general election which was to occur on that day.

I also apprehend that it will be maintained that the language, "If a majority of the electors, voting at such election," means, if a majority of the electors voting *thereon*, or if a majority of the electors voting at such election *on said amendments* shall adopt the same, *then* they shall become a part of the constitution.

This construction, I claim, is wholly unwarranted, and that the language of the constitution, correctly construed, means, that *before an amendment to the constitution can be declared adopted, it must receive a majority of all the votes cast at the election at which it was voted upon, and that it is not sufficient that it received a majority of the votes cast for and against it.*

That this view is correct is shown, I think, by an examination of other provisions of the constitution. Section 18 of the schedule; section 3, Article XVI.

But the section which we are now considering, and which the court is to construe, to-wit, section 1, Art. XVI, provides, "*If a majority of the electors voting at such election, shall adopt such amendment*, then the same shall become a part of the constitution;" and it is clearly apparent, that a provision requiring a majority of *all votes given at a general election for and against an amendment*, is entirely different from a provision which requires an amendment to be adopted by a majority of the electors *voting at a general election*. To illustrate; at the recent election there were 257,662 votes cast for what is known as the "Biennial Amendment," and there were 254,215 votes cast against it, being a majority of 3,447 votes in favor of the amendment, and if the language of the constitution could be construed to mean what will be claimed for it, the amendment would seem to have carried; but I insist that it cannot be so construed, for the language is "a majority of all votes cast at such election," and the total vote for senators and representatives at the time the amendment was voted upon was 780,304, and it would require 380,153 votes to make a majority of this number, or 132,481 *more* votes than were cast for the amendment; and if a less number of electors than a majority of those voting at a general election can adopt an amendment to the constitution, it follows that it requires a less vote to change our constitution than it does to elect state officers; for the lowest candidate upon the state ticket at the recent election received 117,428 more votes than were cast in favor of this proposed amendment.

In 1883 an amendment was proposed to our constitution, the purpose of which was to prohibit the manufacture and sale of intoxicating liquors in this state. 323,129 votes were cast for it, and 226,595 against it, being a majority of 96,534, in favor of the amendment, *of those voting on that proposition*. But no one ever came into court and claimed that it had been adopted, and was consequently a part of the constitution.

It is one of the fundamental principles of statutory and constitutional construction, that in order to ascertain the meaning and intention of the law-makers or framers of the constitution, we may place ourselves as far as possible in the position they occupied when they enacted the statute, or framed the constitution. Relying upon this rule, we can safely look, in trying to determine what construction shall be given to the expression "a majority of all the votes," cast at such election to the debates of the convention of 1851, when the constitution was framed. What construction did the convention place upon this language? See Smith's Debates, Ohio Convention, Vol. 2, p. 338; Debates, Vol. 2, pp. 427-8; Second Debates, 429-30; Second Debates, Ohio Convention, 1874, 2811-13.

It will be thus seen that in two conventions, attempts have been made to change the language of this section so as to provide that a majority of the electors voting for or against an amendment to the constitution should be sufficient, but each time the framers of the constitution refused to make the change.

But we are not without adjudicated authority to aid in arriving at the meaning of the language employed, and which we are endeavoring to construe. *State v. Winkelmier*, 35 Mo. 103; *State ex rel. Omaha Street Ry. v. Bechel*, 34 Northwestern Reporter, 342; *Byard v. Klinge*, 16 Minn. 249; *State v. Swift*, 69 Ind. 505; *State ex rel. Jones v. Commissioners*, 6 Neb. 474; *State ex rel. Davenport v. Brown et al.* 11 Ill. 478; *State ex rel. Wheaton v. Wiant*, 48 Ill. 263.

These authorities clearly establish the doctrine for which I contend in the present case, viz.: that it is not the vote cast for the biennial amendment that is to determine whether or not the amendment carried, but whether that vote was a majority of all the votes cast at that election for senators and representatives. *McCreary on Elections*, sec. 174; *County Seat of Linn County*, 14 Kan. 500; 2 South Eastern Reporter, 351.

The foregoing decisions show the rule to be as we claim it, viz.: where a proposition is to be voted for at some general election, and the authority under which it is submitted, whether



statutory or constitutional, requires "a majority of the electors voting at such election" to adopt it, it is not sufficient that it receive a majority of the votes cast for or against the proposition, but it must receive a majority of all the votes cast at such an election, before it is adopted.

It is perhaps true, that the case of *Gillespi v. Palmer*, 20 Wis. 544, declares a different doctrine. But that decision seems to stand alone, wholly unsupported by the opinion of any other court, and in the subsequent case of *Bound v. Wis. Central R. R. Co.* 45 Wis. 543, was referred to by Chief Justice Ryan, on page 479, as "a decision which has long been a reproach to the court, as a judgment proceeding upon policy rather than upon principle."

It appears to me, however, that the whole question raised by the petition and demurrer in this case has been finally determined by the decision of this court in the case of *Enyart v. Trustees of Hanover Twp.*, 25 Ohio State, page 618.

Constitutions are solemn instruments. They are not to be altered, changed, revised, or amended, except in strict compliance with the method which the instrument itself suggests. Courts never reach such supreme power, such ultimate authority, as when they are invoked to construe their provisions. It makes but little difference to organized society whether A or B is the successful suitor in an action for damages, but let the constitution be misconstrued, and every citizen of the commonwealth is wronged.

I can not close what I have said in support of the demurrer in this case in a more appropriate way than to call the attention of the court to the language of Chief Justice Bronson, in the case of *Oakley v. Aspinwall*, 3d New York, 568.

*LeBlond & Williams*, for the relator.

Brief in reply to the Attorney-General.

The proper construction of section 1, Article XVI, of the constitution, is involved in the determination of the question before this court.

---

The State *ex rel.* v. Foraker, Governor.

---

We desire to call the court's attention to the phraseology, "for six months preceding the next election for senators and representatives." The proposed amendment or amendments shall be published in at least one newspaper in each county of the state "for six months preceding the next election for senators and representatives" *at which time*—not at which election, but "*at which time*," the same shall be submitted to the electors for their approval or rejection.

This clearly shows, as we believe, that the words, "the next election for senators and representatives" are only given to fix the time at which such proposition should be submitted to the electors for their approval or rejection. This, indeed, is clearly shown by the text of the constitution, because the words next following the words: "senators and representatives" are, "*at which time*," not at which election, the same shall be submitted. And, in the phraseology pertaining to its submission is used "approval or rejection."

As was said by a most eminent chancellor, in the celebrated case of *Coggs v. Bernard*, reported in 2 Lord Raymond, 909 and 911: "Then, let us consider the reason of the case, for nothing is law that is not legal reason." Therefore in the discussion of this question, not much attention will be paid to precedents, no matter how many there may be, but rather shall we give attention, as best we may, to the legal reasons which we think are applicable to this case.

How are constitutions interpreted? Bishop on Written Laws, section 92; Potter's Dwarrris on Statutes, 654.

We must then interpret this section of the constitution, and the various words found therein, in the same manner that we would interpret it, if it were a statute. The rules for the interpretation of statutes are well settled.

A proper decision of the question before the court, turns upon the words, "and, if a majority of the electors voting at such election shall adopt such amendments, the same shall become a part of the constitution."

"*A majority of the electors.*" What is a majority of the electors? This involves the consideration of five propositions, to-wit: It means either,

*First*—An affirmative vote which shall be at least equal to a majority of the electors of the state ; or

*Second*—An affirmative vote which shall be at least equal to a majority of the electors who voted on the 5th day of November, 1889, as determined by the total number of names appearing upon all of the poll books ; or

*Third*—An affirmative vote which shall be at least equal to a majority of the electors who voted for governor or some other state officer, chosen by the electors of the state at large ; or

*Fourth*—An affirmative vote which shall be at least equal to a majority of the electors who voted at the election held for senators and representatives ; or

*Fifth*—An affirmative vote which shall be at least equal to a majority of the electors who voted at the election held for the approval or rejection of this proposed amendment to the constitution ; or a majority of the electors voting thereon ; or a majority of the electors voting on that subject.

Addressing ourselves first to authority, we cite Cooley on Constitutional Limitations, (5th ed.) p. 33, note 1 ; page 593, note 1.

In his note at the foot of page 33, he says it is a mooted question. In his note to page 593, he says it is impossible to harmonize the cases.

A very interesting discussion also is found in 22 Albany Law Journal, 44, where the cases which have held on one side or the other of this question are collated and commented upon.

I desire, however, to call the attention of the court to the fact that the edition of Cooley on Constitutional Limitations quoted in the article in the Albany Law Journal is the fourth edition, while that from which we read is the fifth edition.

See also *Gillespie v. Pulmer*, 20 Wis. 544, where this question is very fully discussed from the standpoint of legal reason.

"A majority of the electors," says this section. What is an elector ? Constitution of Ohio, article V, section 1.

---

The State *ex rel.* v. Foraker, Governor.

---

*"Voting at such election."* What is an election? "The act of choosing." Webster. "The act of choosing a person to fill an office or employment." Century Dictionary. "A voting at the polls to ratify or reject a proposed measure." *Ib.* Am. & Eng. Ency. of Law, Vol 6, page 260.

What is a ballot? "A ballot may be defined as a "paper ticket upon which the voter expresses his preference upon the question submitted at the election, by printing, writing or signs, or a combination of all of these methods." Am. & Eng. Ency. of Law, Vol. 6, page 342, note. Cooley on Constitutional Limitations, page 614.

From these definitions, it will not be disputed that the action of the people as to the approval or rejection of an amendment to the constitution is an election.

Therefore, we return to the words. "A majority of the electors voting at such election." What election? The election for senators and representatives is simply given as fixing the time when the proposed amendment should be submitted to the people of the state for their *approval* or *rejection*, and the act of approving, or taking part in the approval or rejection of the proposed amendment, which the constitution says shall be done *at the time* of the election for senators and representatives, is an election in itself, and we claim that that is the election referred to by the phraseology: "a majority of the electors voting at such election."

The last part of section 1, of Article XVI, reinforces the construction for which we contend, because it provides as follows: "When more than one amendment shall be submitted *at the same time*"—not at the same election—"When more than one amendment shall be submitted *at the same time*, they shall be so submitted as to enable the electors to vote on each amendment separately."

If providing a separate ballot and ballot-box for each office or question voted upon on the 5th day of November, 1889, would make each office or question voted upon on that day a separate election, no less would each office or question voted upon be a separate election, when all are placed upon the same ballot and in the same ballot-box. But counsel for the de-

pendant contend that the antecedent of the words "such election" is the election held for senators and representatives, and therefore that it is required that a majority of those voting for senators and representatives must have voted also for the biennial election amendment before it can legally be declared a part of the constitution of the state.

Again let us look into the reason of this case. If only those voting at such election for senators and representatives are to be counted for or against the proposed amendment, how could it be ascertained whether a majority of those voting for senators and representatives also voted for the biennial amendment, except by an inspection of each ballot on which there is a vote for senator and also a vote for representative? The constitution does not say "a majority at least equal to all of those who voted for senators and representatives," but "a majority of the electors voting at such election." Let us consider the words "such election" in the phrase "voting at such election." What is the antecedent of the words "such election?" It cannot, in reason, be the election for senators and representatives, for, as we have just said, if only those voting at such election for senators and representatives are intended, how could it be ascertained whether a majority of those voting for senators and representatives also voted for a constitutional amendment, except by an inspection of each ballot on which there is a vote for senator and also a vote for representative, and, by that means, ascertain whether such elector who voted for both senator and representative also voted for or against a proposed constitutional amendment. But that is what the construction contended for by the attorney-general leads to.

Suppose separate ballots and ballot-boxes were provided for each office or question upon which an elector might have voted on November 5, 1889, (and such a provision would be, in our opinion, clearly constitutional), how could it, by any possibility, be ascertained whether the ballots cast for or against a constitutional amendment were cast by an elector who voted for a senator or a representative?

---

The State *ex rel.* v. Foraker, Governor.

---

This shows conclusively that the words of the constitution, "at the next election for senators and representatives," are used only to fix the time at which the proposed amendment should be submitted to the electors for their approval or rejection.

A reference is made to certain expressions uttered by a member of the convention which framed this constitution, and, which, it is claimed, is decisive that the construction for which we contend, is not correct. We desire to call the attention of the court to the fact that the remarks quoted are made concerning sec. 2, of art. XVI., and that it is only the interpretation of sec. 1, of art. XVI, which is involved in this case. But even concede, for the sake of the argument, that the language used in the debates was concerning sec. 1, of art. XVI, of how much value is it? How much weight is to be attached to it? *Eakin v. Roup*, 12 Serg. & R. 352; *Taylor v. Taylor*, 10 Minn. 107. See also Story on the Constitution, sec. 406. Sedgwick on Statutory and Constitutional Law, (Pomeroy's Edition), page 415.

The practice of the legislative department of this state has uniformly been, with but one exception, in favor of the construction for which we contend, because every proposition, submitted by any general assembly for an amendment to the constitution of this state, since the present constitution has been adopted, has provided a form for a negative as well as for an affirmative vote. Therefore, if the construction for which we contend is *not* correct, then there is no necessity on the part of any elector to cast a negative vote, and there being no necessity, it is a manifest impropriety that he should cast a negative vote; because, if in order for the adoption of a proposed constitutional amendment, it shall require an affirmative vote at least equal to a majority of all the electors voting on that day, or at least equal to a majority of all the electors who voted for senators and representatives, then a negative vote is entirely unnecessary. If a negative vote is entirely unnecessary, why has the general assembly, with but one exception, always provided a form of ballot by which the elector could cast a negative vote? The uniform practice,

then, of one of the three co-ordinate departments of this state has been that the construction for which we contend is right. More than this, the 254,215 electors, who, at the election held for the approval or rejection of the proposed amendment to the constitution, providing for biennial elections, voted against its adoption, re-inforces the construction for which we contend; for why should they have voted "no," if the construction for which the attorney general contends is correct? Why should any of the electors of this state, at any election held for the approval or rejection of a constitutional amendment have voted "no," if the construction for which the attorney general contends is correct?

We shall not argue as to what weight preconceived opinions should have in the determination of this question, because we do not expect the decision of this case to be made upon any preconceived opinion, whether of the bar of this state, or the opinion, so far as ascertained, of the people of the state at large, because the question is not, "What is the preconceived opinion of any person or class of persons?" but the question is, "What does this provision of the constitution mean?" and the only way in which we can interpret or ascertain what this provision of the constitution means, is by what this provision of the constitution says. The preconceived opinion, the popular impression, has been that it requires an affirmative vote equal at least to a majority of all the electors who went to the polls on the 5th day of November, 1889; but where in the constitution is there anything whatsoever that can argue for such a construction? Where is there anything in the constitution that argues for the construction that it requires an affirmative vote at least equal to a majority of all of those that voted for governor or any other state officer on the 5th of November, 1889? The impossibility of ascertaining, officially, the total number of persons who voted for senators and representatives on the 5th day of November, 1889, precludes the construction that it refers to the election for senators and representatives; because the constitution, we take it, is not to be interpreted as requiring impossibilities. Therefore, we are left to the only reasonable con-

struction, that it only requires an affirmative vote equal to a majority of those who voted at the election for the approval or rejection of the constitutional amendment.

No one questions but what, if this proposed amendment had been submitted to the electors of the state for their approval or rejection by a constitutional convention, and had received, at an election held for its approval or rejection, the vote which it received on the 5th of November, 1889, it would have been adopted. No person will contend but what, if it had been an entirely new constitution, containing as did the proposed constitution of 1874, two hundred and thirteen sections, nineteen different articles, fifty to sixty different subjects, it would have been adopted by a majority of those voting thereon. Yet such a construction says that an amendment to the constitution submitted by a majority only of a quorum of a constitutional convention consisting of one house, may be adopted by a majority only of those voting thereon; yet a constitutional amendment, proposed by a general assembly (which is a constitutional convention *ex officio*), composed of two separate houses, by a vote of at least three-fifths of all the members elected to each house, published in at least one newspaper in each county in the state where a newspaper is published, for six months before it is submitted or voted upon; that is, after all these prerequisites which are necessary to have been conformed to, before it could have been submitted;—that in order to its adoption, it must receive an affirmative vote at least equal to a majority of all the electors voting for senators or representatives; or, according to the popular impression, a majority of all the electors who voted on that day upon any other question; something that the constitution in no wise requires. Why, this very proposition about which we are contending, if it had been submitted by a regular constitutional convention, and voted upon by the electors of the state, on the fifth of November last, would have been adopted by a majority of those voting only on that proposition. Would this biennial election amendment proposition have been any more deserving of adoption, if it had been submitted by a



constitutional convention, composed only of one house, and, perhaps by a bare majority of that, than when it is submitted by a general assembly composed of two houses, and by at least three-fifths of the votes of all the members elected to both houses? Yet, if this same proposition had been submitted by a constitutional convention, it would only have been published in pamphlet form, perhaps 50,000 or 60,000 of them printed for circulation throughout the state; whereas, we think we are entirely within bounds when we say that the number of copies of the biennial election amendment circulated among the people of this state was fully equal to five millions.

But it is said that, if the construction for which we contend is correct, and the biennial amendment is adopted, then the prohibition amendment, which was attempted to be submitted to the people in 1883, was also adopted. This does not follow.

A constitutional amendment does not take effect until proclamation is made. That is sustained in the cases of *Sewell v. The State*, 15 Tex. App. 56; *The State v. Morgan City*, 32 La. Ann. 81; *People v. Norton*, 59 Barb. 169. None was ever made in that case.

There was no valid election held for the approval or rejection of the prohibition amendment in 1883, because there was no provision made in that proposition for a "No" vote.

MINSHALL, C. J. The object of this proceeding is to compel the governor of the state to make proclamation of the adoption of an amendment to the constitution of the state, providing for biennial elections, submitted by the legislature to the electors of the state for their adoption or rejection at the last election for senators and representatives. The number of votes cast for its adoption was 257,662; the number of express votes cast for its rejection was 254,215; and the total number of electors voting at the election was 780,304. As will be seen, there were more votes cast for the adoption of the amendment than were cast for its rejection, but the

---

The State *ex rel.* v. Foraker, Governor.

---

number cast for its adoption was not a majority of all the votes cast at the election for senators and representatives—a majority of such votes would have been not less than 390,153.

The amendment having been submitted by the legislature, the question of its adoption or rejection must be determined by the provisions of section 1, article 16 of the constitution, which reads as follows :

“ Either branch of the general assembly may propose amendments to this constitution ; and, if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be published in at least one newspaper in each county of the state, where a newspaper is published, for six months preceeding the election for senators and representatives, for their approval or rejection ; *and if a majority of the electors, voting at such election,* shall adopt such amendments, the same shall become a part of the constitution. When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately.”

By this section an amendment submitted by the legislature must be published, as therein required, “ for six months preceeding the next election for senators and representatives, at which time the same shall be submitted to the electors, for their approval or rejection ; and if a majority of the electors, voting at such election shall adopt ” such amendment it shall become a part of the constitution.

The plain reading of this language would seem to indicate but one construction, and that is, that an amendment so submitted, would require for its adoption a majority of all the electors voting at the election for senators and representatives, as being the election indicated by the language “ such election.” Such seems to have been the view taken of it in the convention that framed the instrument, and such has been the uniform construction placed on it by the people of the state down to the present time. 2 Debates, Convention, 1851, p. 427. See also, 2 Debates, Convention, 1874, p. 2811. While the debates of a convention can have no controlling effect upon

the construction of the provisions of a constitution, they are not without importance where they tend to support a construction indicated by the language of the instrument.

But, it is claimed, that "the election for senators and representatives is simply given as fixing the time when the proposed amendment should be submitted to the people of the state for their *approval or rejection*, and that the act of approving or taking part in the approval or rejection of the proposed amendment, which the constitution says shall be done *at the time* of the election for senators and representatives, is an election in itself, and is the election referred to by the phraseology, "a majority of the electors voting at such election."

The framers of the constitution well understood the use of language; and whatever views may be entertained of the policy of some of its provisions, it must be admitted that the instrument is a model of purity, precision and clearness of expression. In the next two sections of the same article, provisions are made for the submission of amendments, framed by conventions called for the purpose. And as to the adoption of amendments so framed and submitted, it is expressly provided, that "no amendment of this constitution, agreed upon by any convention assembled in pursuance of this article, shall take effect, until the same has been submitted to the electors of the state, and adopted by a majority of those voting thereon." Sec. 3, Art. 16, Con. If then it was intended that a majority of those voting on an amendment, submitted by the legislature, should be sufficient to adopt it, the question arises, why language equally clear and explicit was not adopted to express such intention in the one case as well as in the other; or why, instead of limiting the provision contained in section 3 to amendments "agreed upon by any convention," it was not extended so as to include an amendment submitted by *any* legislature. It would have been natural, and it is probable, that if the framers had had the same intention in framing section 1 as in framing section 3, as to how the majority for the adoption of an amendment should be ascertained, they would have provided in that section as in section 3, that it should be

a majority "of those voting thereon" instead of a majority "of the electors voting at such election." Such a plain difference of language indicates a plain difference of intention.

But the difference in the language employed, is no greater than is the difference in the two cases to which the minds of the framers were directed. No doubt but that stability in its provisions was, as should always be the case, a consideration that influenced the minds of the framers of the constitution in providing for its amendment. Two distinct modes of originating and submitting amendments are provided for; in one it may be done by the legislature, in the other by a convention. Amendments submitted through the agency of a convention are necessarily attended with more deliberation and discussion, than are those submitted by the legislature. Amendments may be submitted by the legislature as often as once in every two years. Hence there is much reason for the provision, contained in section 1, that requires for the adoption of an amendment submitted by the legislature, a majority of all the electors voting at the election at which it is submitted. If it were otherwise, there would be but little, if any, more stability to the constitution, than there is to the statutes of the state. It could, and probably would, be changed every two years.

The argument of the counsel for the relator has the merit of ingenuity. He dissolves a general election into as many distinct elections as there are offices to be filled and questions voted on, at the time it is held. He then utilizes the adverbial phrase, "at which time," so as to make it designate, not the time of a general election, but the time of a number of distinct elections, among which will be, where such are submitted, elections for constitutional amendments; and thence infers that the language "voting at such election," used in sec. 1, means the election upon constitutional amendments.

Such acute criticism upon language would defeat the plain, manifest intention of any instrument, however carefully prepared. We are satisfied beyond a doubt that the construction claimed, is not the meaning of the language used in section 1 of article 16 of the constitution.

But one of the most obvious objections to this construction is, that it requires to be demonstrated by such a labored process of occult reasoning upon the meaning of words and phrases, so different from the apparent meaning, as to warrant the belief that it never occurred, either to the framers of the constitution, or to the people who adopted it. So that, upon settled rules of construction, it should be rejected, if it could be shown to be in accordance with the strict grammar of the language and meaning of the words employed.

But even this cannot be claimed for the construction of the relator. The grammar of the language is against it. "Such," as here used, is a pronominal adjective, and necessarily defines an "election" previously mentioned; and the only one found in the context is an "election for senators and representatives." The construction of the relator requires for its adoption, the insertion of words, descriptive of an election, neither found in the section, nor required to be supplied by any rule of grammar, in order to complete the fullness of expression.

Counsel for the respondent has collected a great many cases bearing upon the question, some of which directly, and most of them by analogy, support the construction for which he contends. But as that construction is, to our minds, so clearly in harmony with the language of the instrument, and that which long years of common consent has placed on it, it is hardly necessary to do more than cite a few of them. *State v. Smith*, 69 Ind. 505; *State ex rel. v. County Commissioners*, 6 Neb. 474; *State ex rel. v. Babcock, Auditor*, 17 Neb. 188; *State ex rel. v. Brown*, 11 Ill. 478; *State ex rel. v. Wheaton*, 48 Ill. 263; *Enyart v. Hanover Township*, 25 Ohio St. 618; *McCreary on Elections*, 174.

In the case of *Gillespie v. Palmer*, 20 Wis. 544, much relied on by counsel for the relator, the judgment of the court was placed, principally, upon the language applicable to that case, and which, as there construed, is substantially different from the language contained in section 1, of article 16 of our constitution. There the language construed was,

---

Trustees of Canaan Township v. Board of Infirmary Directors.

---

"a majority of all the *votes* cast at such election." The court, holding that "*votes*" is not synonymous with voters, determined that a majority of all the votes cast on the subject was sufficient to adopt the amendment. But no such question can arise under our constitution on the meaning of words, the language being, "a majority of all the *electors* voting at such election." While "*electors*" may not be the exact synonym of voters, it is in no sense synonymous with *votes*. So that, if the decision were a sound one, it would not be in point here, by reason of the difference in the language of the two provisions. But the case does not seem to be regarded with very great favor in the state where it was decided. See *Bound v. Railroad Co.*, 45 Wis. 479.

*Writ refused and petition dismissed.*

---

TRUSTEES OF CANAAN TOWNSHIP v. BOARD OF INFIRM-  
ARY DIRECTORS.

*Pending proceedings—Not affected by amendments of statutes.*

Any judgment or final order rendered before § 6723 Rev. Stats., as amended March 28, 1889, took effect (October 1, 1889), may be reviewed on a proceeding in error commenced within two years from the time the judgment or order was rendered.

(Decided December 20, 1889.)

MOTION to dismiss the cause, on the ground that it was not commenced in time.

*James H. Beebe*, for plaintiff in error.

*Olds, Fluckey & Baxter*, for defendants in error.

BY THE COURT. At the May term, 1889, of the Circuit Court of Morrow County, to-wit, on the 25th of May, the defendant in error recovered a judgment, in a proceeding in mandamus, against the plaintiff in error, to reverse which judgment the plaintiff in error commenced its proceeding in this court December 30, 1889.

---

Trustees of Canaan Township v. Board of Infirmary Directors.

---

On March 28, 1889, the legislature adopted an act repealing and amending § 6723 Rev. Stats. (86 Ohio Laws, 167), reducing the time in which proceedings may be commenced "to reverse, vacate or modify a judgment or final order," from two years to six months. The amended section contains no provision making it applicable to "causes of action, prosecution, or proceeding," existing at the time of the amendment or repeal. It provides, however, that it shall take effect from and after October 1, 1889.

*Held:* That the repealed section continued in force until the section, as amended, took effect October 1, 1889; and that, as the plaintiffs in error had the right before the amendment took effect, to prosecute proceedings in error at any time within two years from the time judgment was rendered against them, the taking effect of the statute amended on October 1, 1889, did not affect this right. § 79 Rev. Stats.; *Laferty v. Shinn*, 38 Ohio St. 46; *Bode v. Welch*, 29 Ohio St. 19; *State ex rel. v. Rabbitts*, 46 Ohio St. 178.

*Motion overruled.*





# INDEX.

---

- ABANDONMENT. See PUBLIC HIGHWAYS, 1.  
ABATEMENT OF ACTION. See NUISANCE, 1.  
ACCESSORY. See CRIMINAL LAW, 3, 4, 8.  
ACCIDENT. See NEGLIGENCE, 5.  
ACCOMMODATION PAPER. See COLLATERAL SECURITY, 1, 2, 3.  
ACTS AND ADMISSIONS. See EVIDENCE, 1.  
ACCOMPLICE. See CRIMINAL LAW, 3, 4, 8.  
ADMINISTRATOR. See EXECUTORS AND ADMINISTRATORS.  
ADMISSIBILITY OF EVIDENCE. See CORPORATIONS, 2; EVIDENCE, 1; CRIMINAL LAW, 4, 5, 7.  
ACCOUNTING IN EQUITY. See PARTNERSHIP  
ADJACENT PROPRIETORS. See BOUNDARY LINES, 1, 2; EASEMENTS 1, 2.  
ACCOUNT OF RENTS AND PROFITS. See TENANTS IN COMMON, 1, 2 RENTS AND PROFITS.  
"AFTER-BORN" CHILD. See WILL, 1.  
AGISTER OF CATTLE. See LIEN, 1, 2.  
AGREEMENT. See CONTRACT; RAILROAD, 1; EASEMENTS, 1, 2.  
AGRICULTURAL SOCIETY. See NEGLIGENCE.  
AIDING AND ABETTING. See CRIMINAL LAW, 3, 4, 8.  
ALLOWANCE. See WIDOW; APPEAL, 2.  
AMENDMENTS OF STATUTES. See REMOVAL OF CAUSE, 2.  
AMBIGUITY. See RULES OF CONSTRUCTION, 1.  
AMBIGUOUS WORDS AND PHRASES. See RULES OF CONSTRUCTION, 1.  
ANIMALS—

1. *Running at large*.—Where, without the fault of the owner, a horse passes from such owner's inclosure over or through a line fence into the inclosure of an adjoining proprietor, and thence through a gap in a fence into the inclosure of another and adjacent proprietor, he is not running at large contrary to the provisions of section 4202 (Rev. Stats.); and no person is authorized to take up and confine him until the owner pay or tender compensation or other charges, as provided by sections 4207 and 4208 (Rev. Stats).
2. *Pleadings*.—An allegation that such animal was "unlawfully running at large," with no further statement of the facts, is not a sufficient averment that it was running at large in violation of the provisions of said section 4202. *Rutter v. Henry*, 272.

---

 Appeal—Assignment for Creditors.
 

---

**APPEAL.** See DITCHES, 1; JURY TRIAL, 1; WIDOW;

1. *By stockholder.*—Where, in a suit brought by creditors of an insolvent corporation to enforce statutory liability against stockholders, a defendant pleads that, prior to the insolvency of the corporation, he sold in good faith his shares of stock to another party, who is solvent, and prays that whatever sum may be found to be due as respects the shares so sold may be adjudged against such party, and issue is joined by reply, and a judgment is rendered in the court of common pleas, from which an appeal is taken by the vendor to the circuit court, such appeal carries up the case as to said vendee, whether he appeals, in his own right, or not. *Harbold v. Stobart*, 397.
2. *Allowance to attorney appointed to assist prosecution in criminal case.*—There is no appeal from the amount allowed by the commissioners to an attorney appointed by the court to assist the prosecution in a criminal case. *Commissioners v. Osborn et al.*, 271.

**APPURTENANCE.** See EASEMENTS, 3, 4.

**ASSESSMENTS—**

*Street improvement—Special assessment.*—A municipal corporation having through its proper boards and officers passed a resolution and ordinance to improve a street, in its assessment of the cost and expense of the improvement upon the abutting property, it should be governed by the law in force at the time of the passage of its improvement ordinance, with respect to the manner of assessment and the rights and liabilities of the owners of abutting property. *Cincinnati v. Seabrook*, 296.

**ASSIGNMENT FOR CREDITORS.** See PROBATE COURT; CORPORATIONS, 5; TRUSTS, 5, 9, 10; BAILMENT, 2.

1. *Jurisdiction of probate court in.*—Where one makes a voluntary assignment under the statute, in trust for the benefit of creditors, it is within the jurisdiction of the probate court, at the request of the creditors, the assignor, and the assignee, to terminate the trust, and require the assignee to re-convey the property left in his hands to the assignor, for the purpose of enabling the latter to effect an adjustment with his creditors.
2. *Liability of sureties on assignee's bond.*—Where by the decree of the probate court upon the final account of the assignee, he is ordered to pay over a balance remaining in his hands to the assignor, who thereupon assigns the same to a creditor in satisfaction of his claim, the sureties on the assignee's bond will be liable for his default of payment; and, in an action by the creditor against the sureties to recover the balance so assigned to him, the sureties will be concluded by the decree, although in executing the assignment, there may have been collusion between the assignor and assignee to defraud the creditors, unless an appeal has been taken, or the judgment has been reversed upon a proceeding in error.
3. *Reconveyance by assignee to assignor.*—Upon a proceeding to vacate the trust, and procure a re-conveyance to the assignor of the property assigned, the probate court will not, in rendering a decree that the assignee file his final report and that the trust be ended by complying with the terms

## Attachment—Bailment.

## ASSIGNMENT FOR CREDITORS—Continued.

of the decree, lose its jurisdiction over the person of the assignee for the settlement of his final account; nor will the sureties on his bond, by such a termination of the trust, be released from liability for the assignee's failure to pay over, when ordered by the court, a balance found remaining in his hands. *Garver v. Tisinger*, 56.

## ATTACHMENT—

1. *Proceedings before justices of the peace—When may be reviewed on error.*—An order of a justice of the peace discharging or refusing to discharge an attachment, may be reviewed by petition in error in the court of common pleas, and for that purpose a bill of exceptions may be taken, embodying all the evidence upon the hearing of the motion to discharge, together with the ruling of the justice, and the exceptions thereto.
2. *Weight of the evidence, not reviewable.*—Where the weight of the evidence is the only question presented by such bill of exceptions, this court will not enter upon its review, or disturb the judgment of the court below thereon; but when the party against whom an order of attachment is obtained, in support of his motion to discharge the same, by his affidavit denies the ground of the attachment, stated in the affidavit therefor, it devolves upon the party procuring the attachment, to establish such ground by proper evidence; and whether there is any evidence tending to sustain it, is a question of law, which the parties may have determined by this court. *Seville v. Wagner*, 52.
3. *Different attachments of the same property—How made.*—Different attachments of the same property may be made by the same officer (Revised Statutes, sec. 5535). But personal property held on attachment by one officer, is not subject to levy and seizure under writs in the hands of another officer. In order to attach property in the custody of an officer under legal process, unless the writ is placed in his hands, he must be proceeded against as a garnishee. (*Locke v. Butler*, 19 Ohio St. 587). And this rule is not changed by the assent of the officer holding the property, to the subsequent so-called levy. *Bailey & Co. et al. v. Childs, Groff & Co.*, 557.

## ATTORNEY-AT-LAW. See APPEAL; WARRANT OF ATTORNEY.

1. *Collection of money by—Not a continuing and subsisting trust.*—The receipt of money by an attorney, which it is his duty to pay over to his client, is not a "case of a continuing and subsisting trust" within the meaning of § 4974, Revised Statutes, excepting such trusts from the operation of the statute of limitations. *Douglas v. Corry, Ex'x*, 349.

## BAIL. See SURETY; BOND; ASSIGNMENT FOR CREDITORS; EXECUTORS AND ADMINISTRATORS.

## BAILMENT. See WAREHOUSEMEN; ESTOPPEL.

1. *Rights of bailor and bailee.*—A warehouseman received wheat from farmers, and stored it in his warehouse, giving receipts for it, in the following form:

## Banks—Bill of Exceptions.

B. EMENT—*Continued.*

"BIG PRAIRIE, Sept. 9, '82.

"Received of George Leyda, 173 bu. 20-60 one hundred and seventy three bus. twenty lbs. of No. 2. Wheat. Owner of stored wheat at their own risk.

"W. H. Esterday & Bro."

Nothing was charged for storage, and no time was fixed during which the wheat should remain in store, except that it was to be left until the person storing it should be ready to sell. There was no agreement that the wheat should be mixed with other wheat, or, that the warehouseman might sell, ship, or consume it. When it was stored, the warehouseman mixed it with wheat of his own, of the same grade and quality, and sold from the common mass, but never more than his own quantity, always reserving enough to return to each depositor his proper quantity.

*Held:*

- (a.) The transaction with each depositor constituted a bailment, and not a sale.
- (b.) The title of the depositors to their wheat was not extinguished, or transferred to the warehouseman, by mixing it with other wheat, belonging to him; but each depositor retained a property in his share of the common stock, and the warehouseman could not take from it more than his appropriate share, without a violation of his contract of bailment.
2. *Warehouseman.*—Where a warehouseman, who has received on deposit in his warehouse, the grain of others, to be stored at their risk, mixes it with his own, and without authority from them, sells from the common mass, but never more than his own quantity, always reserving enough to return to each depositor his proper quantity, of the same grade and quality, but not the grain so deposited, the depositors may claim the grain so substituted for their's; and, if it be for their benefit to accept the substitution, such acceptance will be presumed, and their title upheld, against the warehouseman, and his assignee for the benefit of creditors. *O'Dell, Assignee v. Leyda et al.*, 244.

**BANKS.** See COLLATERAL SECURITY; CHECKS; NEGOTIABLE INSTRUMENTS, 1, 2, 3; PROMISSORY NOTES; CONTRACTS; GAMING.

**BILL OF EXCEPTIONS.**—See ATTACHMENT, 1; ERROR; JUSTICE OF THE PEACE.

1. *When not a part of the record.*—A bill of exceptions that is not taken at the trial term or within thirty days thereafter, but taken on overruling a motion for a new trial that has been continued to a term of the court subsequent to the trial, can not be regarded as a part of the record, for the review of alleged errors of law occurring at the trial, in the admission or rejection of evidence, or in the charge of the court or refusal to charge as requested.
2. *When court will not weigh the evidence.*—Where, on overruling such motion for a new trial, the bill of exceptions so taken embodies the

---

 Bill of Lading—Challenge.
 

---

**BILL OF EXCEPTIONS—Continued.**

charge of the court as well as all the evidence, this court will not weigh the evidence for the purpose of determining, whether the verdict was sustained by sufficient evidence, or was contrary to law, or whether substantial justice has been done, or a new trial ought to have been granted. *Finley v. Whitley*, 524.

**BILL OF LADING.** See **ESTOPPEL**, 1.

**BILLS AND NOTES.** See **COLLATERAL SECURITY**; **ACCOMMODATION PAPER**; **PROMISSORY NOTES**; **CHECKS**; **NEGOTIABLE INSTRUMENTS**; **CONTRACTS**; **GAMING**.

**BLANK INDORSEMENT.** See **PROMISSORY NOTES**, 1, 2.

**BOARD OF EDUCATION.** See **PUBLIC SCHOOLS**, 2.

**BOARD OF IMPROVEMENTS.** See **ASSESSMENTS**.

**BONA FIDE PURCHASER.** See **EXECUTORS AND ADMINISTRATORS**, 3, 4; **FRAUD**, 1, 2.

**BOND.** See **EXECUTORS AND ADMINISTRATORS**, 1, 2; **ASSIGNMENT FOR CREDITORS**.

**BOUNDARY LINES.** See **EVIDENCE**, 1; **EASEMENTS**, 1, 2.

1. *Adjoining Proprietors—Boundary Lines.*—Where the adjoining proprietors of lands adjust and settle a disputed boundary line between them, the agreement for that purpose need not be such as would of itself transfer title or right of possession to lands.
2. To enable adjoining proprietors to adjust and settle a boundary line between their lands, it is not necessary that the line should be so uncertain as to be incapable of exact ascertainment; it is sufficient if there is such uncertainty as leads to a *bona fide* dispute respecting its location. *Hills v. Ludwig*, 373.

**BROKER.** See **CONTRACTS**, 6.

**BURDEN OF PROOF.** See **NEGLIGENCE**, 5.

**CANCELLATION OF INSTRUMENTS.** See **CONTRACTS**; **PROMISSORY NOTES**.

**CASES APPROVED, FOLLOWED, DISTINGUISHED, ETC.—**

*Slagel v. Entrekim*, (44 Ohio St. 637). Approved and followed. *Foster, Adm'x v. Wise, Adm'x* 20.

*Locke v. Butler*, (19 Ohio St. 587). Approved and followed. *Bailey & Co. v. Childs Groff & Co.*, 557.

*Schaefer v. Marienthal* (17 Ohio St. 183). Approved and followed. *Neubert v. Phillips*, 559.

**CASES OVERRULED.** *The State v. Powers* (38 Ohio St. 54). Overruled. *State ex rel Atty. Gen'l v. Shearer et al.*, 275.

**CASES CITED.** See **TABLE OF CASES CITED**.

**CAVEAT EMPTOR.** See **EXECUTORS AND ADMINISTRATORS**, 3.

**CHARGE OF COURT.** See **ERROR**, 1.

**CHALLENGE.** See **JURY**; **CRIMINAL LAW**, 1.

## Charitable Trusts—Collateral Security.

CHARITABLE TRUSTS. See TRUSTS, 1 to 10.

CHattel MORTGAGE. See CORPORATIONS, 5.

CHATTELS. See CONDITIONAL SALES.

CHECKS. See GAMING, 1; CONTRACTS, 6; NEGOTIABLE INSTRUMENTS, 1, 2, 3;

*Bank checks.*—A bank check, being an order on the bank by the drawer to pay his money as therein directed, is revocable by him before its presentation for payment, unless the bank on which it is drawn has accepted or certified it, or otherwise become committed to its payment; and while an affirmative answer by the bank, to a general inquiry whether checks of a person named for a specified sum are good, is information that such person has on deposit, subject to check, money to that amount, it does not constitute an acceptance or certification of, or otherwise create an obligation on the bank to pay, checks which the enquirer may then hold. *Kahn, Jr. v. Walton et al.*, 195.

CHURCH PROPERTY. See TRUSTS, 1 to 10.

COGNOVIT. See WARRANT OF ATTORNEY, 1, 2, 3; JUDGMENT BY CONFESSION.

## COLLATERAL SECURITY—

1. *Accommodation note and mortgage held as collateral security.*—The holder of an accommodation note, indorsed to him as collateral security, can recover against the accommodation maker no more than the amount intended to be thereby secured.
2. *When pledgee held as trustee.*—When such note is secured by a mortgage executed by the maker of the note, the pledgee, upon a foreclosure and sale of the mortgaged premises, after receiving payment of the debt due him from the pledgor, will be held as a trustee of the surplus, for the benefit of the mortgagor and his assigns.
3. *Amount recoverable thereon.*—A pledgee can not, by a sale and purchase by himself of such accommodation note and mortgage, under a special power of sale and purchase from the pledgor, recover upon a foreclosure of the equity of redemption, a sum in excess of the debt for which the note and mortgage were pledged as collateral security.
4. *The children of H. made to him their promissory note for \$25,000, secured by mortgage on real estate worth \$100,000, for his accommodation, and to enable him to pledge the same as collateral, and for no other consideration. H. pledged the note and mortgage as collateral security for the payment of a claim of S. against him for \$15,000, and gave to S. a written power to sell the pledge at public or private sale, and to purchase the same. The children, with no knowledge or notice of the power of sale given to S., joined with their father in a written assignment to W., of ten thousand dollars in the note and mortgage, being the surplus over and above the claim of S. and the amount of H.'s indebtedness to W. In consideration of the assignment, W. extended the payment of his claim against H. for one year. S. agreed in writing, on the face of the assignment, to hold the note and mort-*

---

 Commission Broker—Constitutional Amendments.
 

---

COLLATERAL SECURITY—*Continued.*

gage, and deliver the same to W., upon receiving the amount of his claim of \$15,000. Upon non-payment of his claim, S. sold the pledged note and mortgage at public sale, and became the purchaser thereof, for the sum of \$15,000. There was no evidence, that W. at or before the time of the assignment, had any notice of the power of sale; nor had the children any notice or knowledge of the sale until long after it occurred. S., after purchasing the note and mortgage, in a proceeding to foreclose the equity of redemption, claimed \$25,000, the amount of the mortgage note, with interest thereon.

*Held:* That he was entitled to recover \$15,000, with interest, and no more. *Handy v. Sibley*, 9.

5. *Made payable at a particular bank.*—Where a note is indorsed and delivered as collateral security, the indorser and indorsee are to be regarded as sustaining towards each other the relation of pledgor and pledgee; and if such collateral paper matures before the principal debt, the duty and obligation of the pledgee in the collection thereof, is performed by the exercise of reasonable and ordinary care and diligence.

6. *Duty of pledgee.*—If a note is made payable at a designated bank for the convenience of the maker, with no objection by the payee to the place of payment, and is indorsed and delivered by the payee to another bank as collateral security for the payee's own note, and if the collateral paper falls due before the principal debt, it is the duty of the receiver of the collateral, in the absence of any sufficient reason to doubt the solvency of the designated bank, to lodge it with such bank for collection. *Bridge Co. v. Savings Bank*, 224.

COMMISSION BROKER. See BROKER; CONTRACTS, 6.

COMMISSIONERS OF COUNTY. See COUNTY COMMISSIONERS; APPEAL, 2; ATTORNEY-AT-LAW; ALLOWANCE; DITCHES, 1; TWO-MILE ASSESSMENT PIKE LAW, 1, 2, 3.

CONDITIONAL SALE. See CONSTITUTIONAL LAW, 4, 5.

CONFESSION OF JUDGMENT. See WARRANT OF ATTORNEY, 1, 2; COGNOVIT.

CONSPIRATORS. See CRIMINAL LAW, 4, 8.

CONSTABLE. See ATTACHMENT, 3.

CONSTITUTION OF OHIO. See CONSTITUTIONAL LAW.

## CONSTITUTIONAL AMENDMENTS—

*Constitutional amendment—Number of votes necessary for adoption.*—An amendment to the constitution, submitted by the legislature under the provisions of section 1, article 16 of the instrument, requires, for its adoption, a majority of all the votes cast at the election for senators and representatives at which it is submitted to the electors of the state for their approval or rejection. *State ex rel. v. Foraker, Governor*, 677.

---

 Constitutional Law—Contempt of Court.
 

---

**CONSTITUTIONAL LAW.** See **LOCAL OPTION.**

1. *Laws of a general nature.* A law is not necessarily of a general nature by reason simply of its being upon a general subject.
2. *Laws of a special nature.*—Special legislation upon a subject-matter in its nature local, is not prohibited by section 26 of article 2, of the constitution, which provides that "all laws of a general nature shall have a uniform operation throughout the state," notwithstanding the subject-matter is the subject of a general law.
3. *Special school district, sec. 26, article 2, of the constitution construed.*—The subject of dividing territory into school districts, is, in its nature, local. Hence, the formation of a special school district from territory within the limits of a township, by special act, is not in conflict with section 26 of article 2, of the constitution. *The State v. Powers*, 38 Ohio St. 54, overruled; *State ex rel. Attorney-General v. Shearer et al.*, 275.
4. *Conditional sales of personal property—Constitutional law.*—The act passed May 4, 1885 (82 O. L. 238) entitled "an act to regulate conditional rates and sales of personal property, and provide for filing instrument pertaining to the same with certain officers, and making a violation thereof a misdemeanor," is not in conflict with either section 16 or 19 of article 1, or section 16 or 28 of article 2, of the constitution of this state.
5. The second section of the act, which makes it unlawful for the vendor of personal property sold as therein specified, to take possession of such property, without tendering or refunding to the purchaser, the sum paid by him, "after deducting therefrom a reasonable compensation for the use of such property," is not invalid on the ground that the amount of such compensation is uncertain, and no method is provided by the act for determining the same. *Weil v. State*, 450.

**CONSTRUCTION OF STATUTES.** See **REMOVAL OF CAUSE**, 2.

**CONSTRUCTIVE NOTICE.** See **RAILROADS**, 1, 2.

**CONTEMPT OF COURT—**

1. *Contempt of court—What is.*—The furnishing by a correspondent for publication, and procuring to be published in a newspaper, an article containing statements regarding a judge then engaged in the trial of a cause, imputing to him conduct in respect to the case upon trial, which, if true, would render him an unfit person to preside at the trial of the cause, with knowledge on the part of the correspondent that such newspaper has a large circulation in the county where the trial is in progress, and with reasonable ground to believe that the same will, when published, be circulated in the court room and about the court-house during said trial, and there read, and which was, afterward, during the trial, circulated and read therein, is a contempt of court.
2. *Punishment for.*—Such act comes within the purview of section 5639, Revised Statutes, which provides that, "A court, or judge at chambers may punish, summarily, a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of



Continuing and Subsisting Trust—Contracts.

CONTEMPT OF COURT—Continued.

- justice," and may be punished summarily, and such punishment is within the discretion of the court trying the case.
3. *Proceedings for.*—A proceeding to punish for contempt under said section, including the question whether or not the court, in awarding punishment, has exercised a reasonable discretion, may be reviewed upon error.
  4. *Presiding judge may try.*—The fact that the presiding judge is the subject of libel in the article which forms the basis of the contempt proceeding, does not render him incompetent to try the complaint.
  5. *What he may take judicial notice of.*—Upon such trial it is competent for such judge to take judicial notice of pertinent facts connected with the transaction which come within the cognizance of his own senses.
  6. *What he may not take judicial notice of.*—It is not competent for him to take judicial notice of, and consider in his deliberations, that the respondent had been guilty of another contempt of the same court, for which he had theretofore been tried and found guilty. And where it appears that the consideration of such facts may have influenced the exercise of discretion, in fixing the penalty, to the prejudice of the respondent, the proceeding will be reversed for such error.—*Myers v. State*, 473.

CONTINUING AND SUBSISTING TRUST. See ATTORNEY-AT-LAW, 1; PARTNERSHIP.

CONTRACTS. See RAILROADS, 1, 2; PROMISSORY NOTES, 1; GAMING, 1.

*Written instruments—When oral testimony admissible to aid in the interpretation of.*—M. executed and delivered to T. J. M. a written instrument, the terms of which are, "the Woolen Mill Company, of Bucyrus, Ohio, having sold to M. one-half of the Woolen Mill property for the sum of seven thousand five hundred dollars, two thousand five hundred dollars to be paid April 1, 1877, the other five thousand dollars with the following provisions: after M. receives dividends to the amount of ten per cent. on the money he puts into the mills, T. J. M. is to receive dividends as interest on the five thousand dollars above named *pro rata* with the firm for the term of five years, and if the mills do not pay dividends up to ten per cent. on the money put in by M. at the expiration of five years, he may continue the same conditions until they do." *Held*:

1. That, within the rules of evidence, which forbid oral testimony to contradict or vary the terms of written agreements, but permit such testimony to prove the circumstances under which they were made to enable the courts to put themselves in the place of the parties, with all the information possessed by them, the better to understand the terms employed in the contract, and arrive at the intention of the parties, it is competent to show that the Woolen Mill Company, of Bucyrus, Ohio, was the name of a co-partnership which consisted of T. J. M. and another person, who, at the date of the instrument, were the owners of

CONTRACTS—*Continued.*

the Woolen Mill property referred to; that the half thereof stated in the instrument as having been sold to M. was the plaintiff's undivided interest in the property, and that the other co-partner's undivided interest, was, about that time, sold to another person for the like price; also, that after M. executed the instrument, and delivered the same to T. J. M., he paid to him the twenty-five hundred dollars therein stipulated to be paid April 1, 1877, and that thereupon T. J. M. and his co-partner united in a deed of conveyance to M. and the other purchaser, the consideration therein expressed being fifteen thousand dollars.

2. That the purchase price of T. J. M.'s undivided interest in the property, is seven thousand five hundred dollars, to be paid him by M., the purchaser; twenty-five hundred dollars thereof to be paid April 1, 1877, but the other five thousand dollars not until the expiration of five years, during which time, T. J. M. is to receive as interest thereon, a share of the dividends remaining after M. shall receive dividends earned by the mill equal to ten per cent. on the amount invested by him in the mill; if the dividends do not equal that amount, the provision for the payment of interest to T. J. M. fails, which enables M. to retain the five thousand dollars of the purchase-money for five years without interest, and to continue, after the expiration of that period, to retain it on the same conditions as to interest, until the mill shall pay dividends equal to ten per cent. on his investment. But the principal of five thousand dollars is payable in any event at the end of five years from the date of the instrument, unless M. should then elect to continue the conditions in regard to interest; and a sale by him before that time, of his interest in the property, is a conclusive election not to do so, whereupon the principal becomes payable absolutely.
3. *Pleadings—Practice.*—That in an action brought on the instrument by T. J. M., against M.'s administrators, to recover the five thousand dollars, where the reformation of the instrument is not sought by the defendants, and their pleadings do not entitle them to such relief, parol evidence is inadmissible to prove that the twenty-five hundred dollars stipulated to be paid April 1, 1877, was the full purchase price of the property, or that the plaintiff was to be paid no part of the five thousand dollars, unless the net earnings of the mill should exceed ten per cent. on the amount of money invested in the mill by M.
4. *Interpretation of belongs to the court.*—In the trial of such action, the interpretation of the instrument belongs to the court, and it is error to submit its construction to the jury. *Monnett v. Monnett*, 30.
5. *Contracts for sale of personal property to be delivered at a future day—When valid—When void.*—Contracts for the sale of personal property to be delivered at a future day, if the parties intend the property shall be delivered and paid for, are valid, though the seller have not the goods, nor other means of getting them than to go into the market and buy them; but, when the real intention of the parties is merely to speculate on the rise and fall of prices, and the property is not to be delivered,

## Contributory Negligence—Corporations.

## CONTRACTS—Continued.

but one party is to pay the other the difference between the contract price and market price of the goods at the time specified for executing the contract, the transaction is against public policy, and void.

6. *Commission broker in illegal sales, a particeps criminis*.—A commission broker, who with knowledge of its unlawful character, negotiates an illegal agreement between parties, becomes a *particeps criminis*, and cannot recover for services rendered, or losses incurred by him in behalf of either, in forwarding the unlawful undertaking; and checks, given him for such services or losses, are tainted with the vice of their origin, and subject to all the infirmities of securities given for illegal considerations. *Kuhn, Jr. v. Walton et al.*, 195.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 2, 3, 4.

CONVERSION OF ASSETS. See EXECUTORS AND ADMINISTRATORS, 1,

CORPORATIONS. See TAXATION, 1, 2. RAILROADS; STOCKHOLDERS, 1, 2.

1. *Stockholders—Liability of—When judgment not necessary*.—In an action by creditors to enforce the statutory liability of stockholders for debts contracted by a corporation, where it is alleged that the company is insolvent; that it has entirely ceased to do business; and that it has made an assignment for the benefit of creditors, having neither money, credit nor materials with which to transact business, it is not necessary further to allege that the plaintiff had recovered a judgment against the corporation upon which an execution had been returned unsatisfied.
2. *Transfer of stock—Evidence—Admissibility*.—Upon the trial of the action one of the defendants, an alleged stockholder, offered to prove that he originally became a stockholder by receiving from the corporation its stock in exchange for his interest in a furnace of which he was principal owner; that thereafter, the furnace not proving as successful and profitable as had been expected, some of the stockholders were dissatisfied with the purchase, and contentions arose among them; that defendant was blamed by many of them for having induced the company to make the purchase and was requested to take the furnace back and transfer to the company the stock he had received for it; that to settle such contention and dissatisfaction he complied with this request, transferred his stock to the company and accepted therefor a deed for the furnace. *Held*: The evidence was admissible. *Morgan v. Lewis*, 1.
3. *Subscription by one corporation, to capital stock of another*.—An incorporated company cannot, unless authorized by statute, subscribe to the capital stock of another; a subscription so made is *ultra vires* and void.
4. *Action by, to recover money voluntarily paid*.—The rule, that a payment voluntarily made under a mistake of law, but with a full knowledge of the facts, cannot be recovered back, rests upon general principles of public convenience, and applies to a corporation as well as to a natural person. *Railway Co. v. Iron Co.*, 44.
5. *Assignments by—When cannot create valid preferences*.—A corporation for profit, organized under the laws of this state, after it has become insol-

## Costs—Criminal Law.

CORPORATIONS—*Continued.*

ent, and ceased to prosecute the objects for which it was created, cannot by giving some of its creditors mortgages on the corporate property to secure antecedent debts without other consideration, create valid preferences in their behalf over the other creditors, or over a general assignment thereafter made for the benefit of creditors. *Rouse, Trustee, v. National Bank*, 493.

COSTS. See FEES AND COSTS.

COUNSEL. See ATTORNEY-AT-LAW.

COUNTY COMMISSIONERS. See APPEAL, 2; ATTORNEY-AT-LAW  
DITCHES, 1; TWO-MILE ASSESSMENT PIKE LAW.

COURT, PROBATE. See ASSIGNMENT FOR BENEFIT OF CREDITORS.

COVENANT AGAINST INCUMBRANCES. See EXECUTORS AND ADMINISTRATORS; EASEMENTS.

COVENANT RUNNING WITH THE LAND. See RAILROADS, 1, 2.

CREDITORS BILL. See CORPORATIONS, 1.

CRIMES. See CRIMINAL LAW.

## CRIMINAL LAW--

1. *Peremptory challenge of jurors by defendant.*—A defendant in a criminal trial is only entitled to two peremptory challenges unless he is on trial for a capital offense. And the fact that he had been indicted for murder in the first degree; that a jury of thirty-six had been summoned and were in attendance for his trial; that a *nolle* was then entered as to the charge of murder in the first degree; and that a jury to try him for murder in the second degree was being impaneled from the thirty-six jurors so in attendance, did not enlarge his right in this respect.
2. *Qualifications of jurors in criminal cases.*—(a) A juror who states on his examination that he has formed an opinion on a matter affecting the guilt of the defendant, from having heard the circumstances of the crime related by one who claimed to know them, may nevertheless be competent to sit as a juror if he says on oath that he believes he can render an impartial verdict in the case, and the court is satisfied he can do so.  
(b) The fact that the court admitted him to sit as a juror is a sufficient finding that it was satisfied he could render as impartial verdict.
3. *Aider and abettor of the crime of murder.*—One indicted as an aider and abettor of the crime of murder may be placed on trial, convicted and sentenced for that offense, notwithstanding the principal offender has been tried previously, and convicted and sentenced for manslaughter only.
4. *Conspiracy—Declarations of co-conspirators—When admissible.*—(a) On the trial of one of several defendants jointly indicted for an offense, the declarations of a co-defendant, made in the absence of the defendant on trial, in furtherance of the common purpose, are admissible when a *prima facie* case of conspiracy has been made.

## Cross-Examination—Devise.

## CRIMINAL LAW—Continued.

- (b) To authorize the admission of such evidence, an express averment in the indictment, of the fact of a conspiracy, is not necessary.
- (c) Nor need the conspiracy be one to commit the identical offense charged in the indictment, or even a similar one; it being enough that the offense charged in the indictment was one which might have been contemplated as a result of the conspiracy.
- 5. *Mob—When cries of admissible.*—On the trial of one charged with homicide, where the defense is that the killing was done in resisting an attack from a mob, the cries of the mob from the time it was formed, though made before the deceased joined it, are competent evidence to prove its spirit and purposes, and as reflecting upon its attitude at the time the alleged attack was made.
- 6. *Self-defense.*—Where a number of persons, in the exercise of their lawful rights, have reason to apprehend an immediate, violent and criminal assault upon them as a party from superior numbers, it is not unlawful for them to combine for their just defense.
- 7. *Mob—When acts of admissible.*—Where one is on trial for homicide, and is defending on the ground that the killing was done in repelling the attack of a mob, he has a right to prove, and have the jury consider, the violent, malicious and criminal acts and declarations of the mob.
- 8. *Who not an aider and abettor.*—In the absence of proof of a conspiracy, one who is present when a homicide is committed by another upon a sudden quarrel or in the heat of passion, is not guilty of aiding and abetting the homicide, although he may become involved in an independent fight with others of the party of the deceased, unless he does some overt act with a view to produce that result, or purposely incites or encourages the principal to do the act. *Goins v. State*, 457.

## CROSS-EXAMINATION—

*Immaterial matters.*—The extent to which immaterial matters may be inquired into upon cross-examination, rests in the sound discretion of the court in which the witness is being examined. *Village of Shelby v. Claggett*, 549.

CROSS-PETITION IN ERROR. See PRACTICE IN CIVIL CASES, 1.

COURTESY. See DOWER.

DAMAGES. See NEGLIGENCE; NUISANCE, 1.

DEATH BY WRONGFUL ACT. See NEGLIGENCE.

DECLARATIONS AND ADMISSIONS. See EVIDENCE, 1; WITNESS.

DEDICATION. See EASEMENTS.

DEED. See EXECUTORS AND ADMINISTRATORS; EASEMENTS; ASSIGNMENT FOR CREDITORS.

DESCENT. See WILL.

DEVISE. See WILL, 1, 2, 3, 4.

## Ditches and Drains—Easements.

## DITCHES AND DRAINS—

*County ditch—Evidence on appeal.*—On an appeal to the probate court from the order and finding of a joint board of county commissioners, determining that a proposed ditch is necessary, and will be conducive to the public health, convenience and welfare, the jury, in examining and determining the matter appealed from, may, under sec. 4467 of the Revised Statutes, consider in evidence, facts made known to them personally from an actual view of the premises. *Williams v. Lockman*, 416.

**DIVORCE.** See EXECUTORS AND ADMINISTRATORS, 3.

**DOWER.** See EXECUTORS AND ADMINISTRATORS, 3.

1. *Contingent right of—How ascertained.*—The contingent right of a wife, during her husband's life, to be endowed of his real estate at his death, is property having a substantial value that may be ascertained with reasonable certainty from established tables of morality, aided by evidence respecting the state of health and constitutional vigor of the husband and wife respectively.
2. *Where wife has joined in mortgage of husband's lands.*—Where the wife has joined in a mortgage of the husband's land to secure his debt, upon a judicial sale of the premises, she may have the value of her contingent right of dower in the entire proceeds ascertained, and the husband's entire interest therein shall be exhausted to pay the debt before resorting to the interest of the wife therein.
3. *Release of dower, in such mortgage—Effect of.*—The release, in such mortgage, of her contingent right of dower does not enure to the benefit of the husband's subsequent judgment creditors, and, as against them, the ascertained value of her contingent right of dower in the entire proceeds of the sale will be paid to her out of the balance left when the mortgage debt is paid, before any part thereof will be distributed to them on their judgment. *Mandel v. McClave*, 407.

## EASEMENTS—

1. *May be established by mutual agreement of adjacent property owners.*—A way, laid out by an owner over his lands for the benefit of parcels thereof into which he subdivided them for sale, the boundaries of which way, the purchasers of the several parcels definitely establish by mutual agreement, and thereafter improve and use it for the benefit of their lands, is an easement annexed to the lands, and passes by a grant of the land without being mentioned in the conveyance. The grantee takes the rights his grantor had with respect to it, and holds his land subject to the burden it imposed.
2. *Agreement may be enforced in equity—Injunction a proper remedy.*—Where proprietors of adjacent lands, by mutual agreement, definitely establish the boundaries of a private way, previously laid out along their lines, and appropriate the strip of land embraced therein to be used as a perpetual easement for the benefit of the abutting lands of each, and the common benefit of all, and, in pursuance of the agreement, fence

## Equity.

**EASEMENTS—Continued.**

to the boundaries so agreed upon, and thereafter improve and use the way thus established, the agreement may be enforced in equity, at the suit of a purchaser from one of the proprietors, against a purchaser with notice from another. Injunction preventing the permanent obstruction of, or interference with such way, is a proper mode of enforcing the agreement. *Shields v. Titus*, 528.

3. *Easements appurtenant*.—When the owner of an entire estate, makes one part of it visibly dependant for the means of access, upon another, and creates a way for its benefit over the other, and then grants the dependant part, the other part becomes subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee as accessorial to the beneficial use and enjoyment of the granted premises.

4. *Same*.—The owner of a lot situated at the corner of intersecting streets in a city, erected thereon a three-story building, covering the whole of the lot. A stairway leading from the principal street to the second story of the building, was constructed in the corner room of the first story. At the landing of the stairway, and connected with it, a hall was made, extending across the second floor of the room next to the corner room, and connecting with the second story of the next adjoining room. The rooms on the second story were intended for offices, and to adapt them to such use, doors were made opening into them from the hall. Another stairway was also put in, running from the hall to the third story. The stairway leading from the street to the second story was, and is, the only means of access to the hall above, and to the rooms opening into it, and the use of the stairway was, and is necessary to their proper use and enjoyment. While the premises were in this condition, the owner sold and conveyed a part thereof described by metes and bounds, which included the hall connected with the landing of the stairway leading from the street, and the office rooms on the second floor opening into the hall, which had no means of access except through the hall, and by the stairway. The purchaser, with the knowledge of his vendor, who retained the corner room, in which was the stairway, immediately entered upon, and continued the use of the stairway as his only means of access to the hall and connecting rooms purchased by him.

*Held*: That by the conveyance a right to the use of the stairway passed to the purchaser, as an easement appurtenant to the premises conveyed. *Exchange Bank v. Cunningham*, 575.

**EQUITY. See CONTRACTS,; PROMISSORY NOTES, 2; EASEMENTS, 2.**

1. *Parties to illegal contracts—No standing in a court of equity—Their legal rights*.—A plaintiff, who founds his cause of action on an illegal or immoral act, has no standing in a court of equity; and where both parties have been engaged in an unlawful transaction, the court will neither lend its active aid to the one party to get rid of the securities taken upon

## Error—Executors and Administrators.

EQUITY—*Continued*.

such transaction, nor assist the other party in retaining them, but will leave both to their strict legal rights *Kahn, Jr. v. Walton et al.* 195.

**ERROR.** See ATTACHMENT, 1; JUSTICE OF THE PEACE; PRACTICE IN CIVIL CASES, 1, 2, 3; CROSS-PETITION IN ERROR; PROMISSORY NOTES, 3; WARRANT OF ATTORNEY, 2; CONTEMPT OF COURT, 3, 6; MUNICIPAL CORPORATIONS, 1.

*When considered.*—Where the error complained of in this court is that the trial court omitted to charge the jury a proposition of law involved in the case, and the court's attention was not directed to it except by one of a series of propositions, all of which the court refused to give, and the alleged error was not included in the motion for a new trial, or assigned in the circuit court for error, it will not be considered here, unless for some special or peculiar reasons, affirmatively appearing upon the record. *Hills v. Ludwig* 373.

## ESTOPPEL—

*Estoppel in pais*—*When it arises.*—An estoppel in pais arises where one is prejudiced by the willful act or declaration of another upon whose conduct the former has rightfully acted. Hence, where the owner of goods sells to one on credit, and knowingly delivers to him a receipt drawn in such form, and given under such circumstances as to cause an innocent purchaser, buying from the vendee, rightfully to believe that the goods will be delivered upon compliance by said purchaser with certain conditions in the receipt contained, and he parts with his money in good faith upon the belief thus created, such purchaser has the right to avail himself of the terms of the contract and the vendor is estopped to afterward set up a lien for purchase-money and insist upon its payment as further condition to delivery of the goods. *Ensel v. Levy & Bro.* 255.

**EVIDENCE.** See ERROR, 2; DITCHES, 1; CORPORATIONS, 2; PROMISSORY NOTES, 3; WITNESSES; CRIMINAL LAW, 4, 5, 7; CONTRACTS.

1. *Acts of admission*—*When not admissible.*—The acts and admissions of the grantor of lands, respecting a disputed boundary line, done or made by him after he has parted with his title, are not admissible against his grantee; and the rule is not changed, although he retains the ownership of other lands affected by the same disputed boundary line, and his acts and admissions relate to his own lands.
2. *Evidence*—*Rejection of when not error.*—Where evidence, if admissible at all, is evidence in chief, and the party omits to offer it then, but, without explanation of the omission, offers it in rebuttal and it is then rejected by the trial court, this court will not pass upon its competency. *Hills v. Ludwig et al.*, 373.

**EXECUTORS AND ADMINISTRATORS.** See WILL, 4.

1. *Conversion by, of assets of estate*—*Liability of sureties.*—The sureties on an administration bond, given by an executor who has been removed, are liable thereon to the administrator appointed in his place for the in-



## Exemption—Fees and Costs.

**EXECUTORS AND ADMINISTRATORS—Continued.**

debtedness of such executor to the estate for assets received by him and converted to his own use and a recovery may be had therefor by the successor in a suit on the administration bond *Slagel v. Entrekin*, 44 Ohio St. 637, approved and followed

2. *Subsequent execution of new bond by*—When sureties on new bond liable for assets so converted—Section 6020 Revised Statutes, construed.—An executor gave a new bond as required by the probate court, on the motion of his sureties on the prior bond to be relieved under section 6204 of the Revised Statutes. Subsequently the executor was removed by the court, and an administrator with the will annexed was appointed in his place. Prior to giving the new bond, which was in the form required by section 5996 of the Revised Statutes, the executor had collected and converted to his own use all the assets of the estate. *Held*: That the sureties on the new bond are liable for the indebtedness of the executor to the estate for all the assets so collected and converted to his own use. *Foster, Adm'r v. Wise, Adm'r*, 20.
3. *Application of the rule, caveat emptor to purchasers at executor's sale, where dower has not been assigned*.—An executor, under an order issued by the probate court in a suit to sell lands to pay the debts of the decedent, sold the same without making the former wife of the decedent, who had obtained a divorce from him on account of his aggressions, a party to the suit. The purchaser being advised by counsel that the title to the lands was clear and unincumbered, and that the wife had no dower-estate therein, bought the lands at their full value in money, paid over the money to the executor, and entered into possession of the premises. The court of common pleas afterwards adjudged, that the divorced wife was dowable of the lands, and dower therein was accordingly assigned and set off to her. *Held*: That the purchaser can not maintain an action to recover back sufficient of the purchase-money, to compensate him for the loss he has sustained, by reason of the assignment of dower, and that the rule, *caveat emptor*, is applicable.
4. *When executors cannot bind decedent's estate, by a promise of indemnity against incumbrances*.—In the absence of authority derived from the will, or from the order issued by the court for the sale of the lands, the executor can not bind the estate of his decedent, by a verbal promise to indemnify the purchaser against incumbrances or defects in title. *Arnold v. Donaldson*, 73.

**EXEMPTION.** See HOMESTEAD.

**EXPERT AND OPINION.** See WITNESS, 3.

**FENCES.** See RAILROADS, 1; ANIMALS, 1.

**FEES AND COSTS—**

*Sheriff's fees for venire for jury*.—Section 1230, Rev. Stats. (77 Ohio L. 116), relating to compensation to sheriffs, which provides that they shall receive for "serving and returning venire for petit or grand jury, traveling fees included, to be paid by the county, four dollars and fifty cents;

## Findings of Fact—Fraud.

**FEES AND COSTS—Continued.**

or summoning a jury, to be allowed on each issue, including traveling fees, forty cents; summoning a special jury, including traveling fees, four dollars and fifty cents," authorizes payment by the county of four dollars and fifty cents to the sheriff for the service and return of each venire for a regular petit jury, or a grand jury, or a special jury, but does not authorize payment by the county for the service and return of a special venire for jurors to fill up the panel. *State ex rel. Ensign v. Root, Aud'r*, 510.

**FINAL ORDER.** See **WIDOWS**.**FINDINGS OF FACT—**

1. *Circuit court not required to make.*—The circuit court is not, under section 6710 of the Revised Statutes, as amended May 4, 1885 (82 Ohio L. 230), required, in a proceeding in error, to make a finding of facts, though the evidence is all set forth in a bill of exceptions. *Scarf v. Pyle* 102.
2. *When not authorized.*—A finding of fact, made by the circuit court from the evidence contained in a bill of exceptions in a case before it on error, is not authorized by sec. 6710 of the Rev. Stats., as amended May 4, 1885 (82 Ohio L. 230), and if in fact made, will present no question that this court will review. *Young, Treas. v. The Pennsylvania Co.*, 558.

**FINES.** See **CONTEMPT OF COURT**.**FIDUCIARY RELATION.** See **TRUSTS**; **EXECUTORS AND ADMINISTRATORS**; **ATTORNEY-AT-LAW**; **PARTNERSHIP**.**FOREIGN CORPORATIONS.** See **TAXATION**, 1.**FORCIBLE ENTRY AND DETAINER.** See **MALICIOUS PROSECUTION**, 1.**FORECLOSURE.** See **MORTGAGE**; **COLLATERAL SECURITY**, 4; **DOWER**, 2, 3.**FORGERY.** See **NEGOTIABLE INSTRUMENTS**, 1, 2, 3; **CHECKS**.**FRAUD.** See **NEGOTIABLE INSTRUMENTS**, 1, 2, 3.

1. *Transfer of goods fraudulently obtained, in payment of a pre-existing debt.*—Where a purchaser fraudulently obtains goods from the owner, and transfers them to another in payment of a pre-existing debt, such pre-existing debt alone will not be a sufficient consideration to constitute the transferee a *bona fide* purchaser for value, as against the owner from whom the goods were thus obtained by fraud.
  2. *Bona fide purchaser.*—D. by false and fraudulent representations, purchased and obtained goods on credit from E. Shortly after the purchase, to-wit: on August 7, 1884, D. was insolvent, and on that day transferred the goods with other goods and merchandise to W., who, as a consideration for the transfer, cancelled and surrendered to D. an interest-bearing note for \$3,000, made by D. himself to W., dated October 8, 1883, and due in one year from date.
- Held:** That W was not a *bona fide* purchaser for a valuable consideration as against E. *Eaton & Co. v. Davidson*, 355.

Fraudulent Conveyance—Incumbrances.

**FRAUDULENT CONVEYANCE.** See FRAUD, 1, 2.

**"FUTURES."** See CONTRACTS, 5.

**GAMING.** See CONTRACTS, 5, 6; "FUTURES;" "MARGINS."

*Check for money lost at—Absolutely void in hands of innocent holder—*The indorsee of a check given for money lost at a game of cards can not recover upon it against the drawer, though a *bona fide* holder for value without notice of the vice in the consideration. A check so drawn is within the provisions of sec. 4289, Revised Statutes, and "absolutely void and of no effect." *Lagonda National Bank v. Portner*, 381.

**GARNISHMENT.** See ATTACHMENT, 3.

**GENERAL AND LOCAL LAW.** See CONSTITUTIONAL LAW.

**GRAIN ORDERS.** See CONTRACTS, 5, 6, 7, 8.

**GRAND JURY.** See JURIES.

**HEIRS.** See WILL.

**HIGHWAY.** See PUBLIC HIGHWAYS.

**HOMESTEAD—**

1. *Decree subjecting separate property of married women—Occupation of same by her for a homestead before issuing order of sale.*—Where a married woman living with her husband, charges her separate property for the payment of a note executed by her and her husband jointly, if he has no homestead, she will be entitled, in an action on the instrument, to an assignment of a homestead in such property, when occupied by her as a family homestead before the levy of an execution, or before an order of sale was issued upon a decree specifically subjecting the property to the payment of the claim of the judgment creditor.

2. *Application of homestead act to lands in co-tenancy.*—Where such separate property consists of an undivided interest in land, and there has been, without the knowledge of the judgment creditor, a voluntary partition between the tenants in common before levy of the execution or issue of the order of sale, the wife will be entitled to a homestead in the interest set off to her in severalty, subject to the creditor's right, upon proper issues made, to inquire and determine as to the justice of the partition.

*Hill v. Myers*, 183.

**HOMICIDE.** See CRIMINAL LAW.

**HUSBAND AND WIFE.** See HOMESTEAD, 1, 2; DOWER.

**ILLEGAL CONSIDERATION.** See GAMING, 1; CONTRACTS.

**IMPANELING.** See CRIMINAL LAW, 1, 2, 3; JURY.

**IMPEACHING WITNESS.** See WITNESS, 1, 2.

**IMPLIED CONTRACT.** See CONTRACTS.

**IMPRISONMENT.** See CONTEMPT OF COURT.

**IN PARI DELICTO.** See GAMING; CONTRACTS.

**INCUMBRANCES.** See EXECUTORS AND ADMINISTRATORS, 4.

---

 Individual Liability of Stockholders—Judgment.
 

---

**INDIVIDUAL LIABILITY OF STOCKHOLDERS.** See STOCKHOLDERS.

**INDORSEMENT.** See BLANK INDORSEMENT; PROMISSORY NOTES, 1, 2; CHECKS; NEGOTIABLE INSTRUMENTS, 1, 2, 3.

**INFANTS.** See NEGLIGENCE.

**INJUNCTION.** See EASEMENTS, 2.

**INNKEEPER.** See LIEN, 1, 2.

**INNOCENT HOLDER.** See CHECKS; GAMING.

**INSOLVENCY.** See CORPORATIONS, 5; ASSIGNMENT FOR CREDITORS.

**INSURANCE, LIFE—**

*Life insurance—Lapse of premiums—Pleadings—Practice.*—Where in a suit upon a policy of life insurance the plaintiff relies upon the provisions of a statute of the state of the company that issued it, to avoid the effect of a forfeiture for non-payment of premiums, the facts bringing the case within such provision must be averred. *Scheifers v. Insurance Co.*, 418.

**INTEREST.** See TENANTS IN COMMON, 2; PROMISSORY NOTES, 3.

**INTERPRETATION OF WRITTEN INSTRUMENTS.** See CONTRACTS, 1, 2, 3, 4.

**INTOXICATING LIQUORS.** See LOCAL OPTION.

**JOINT TENANCY.** See TENANTS IN COMMON; RENTS AND PROFITS.

**JUDICIAL DISTRICT.** See JUDICIAL SUBDIVISIONS, 1.

**JUDICIAL SUBDIVISIONS—**

*Change of judicial subdivisions.*—The act of March 21, 1887 (84 Ohio L. 229), to repeal sec. 1 of "an act to change the subdivisions in the second judicial district, and to provide for the election of an additional judge in the first subdivision," passed March 13, 1868 (65 Ohio L. 25), not having been passed by a concurrence of two-thirds of the members elected to each house, is invalid, and ineffectual to change Montgomery county from the first subdivision to the second subdivision of the second judicial district. *Slate v. Kinninger*, 570.

**JUDGE.** See REMOVAL OF CAUSE; JUDICIAL SUBDIVISION.

**JUDGMENT.** See VACATING JUDGMENT, 1; CORPORATIONS, 1.

*Offer to confess—Rule as to costs.*—Where, in an action for the recovery of money, commenced in a justice's court, the defendant, in that court, offers to confess judgment for a given amount, with interest from the accruing of the debt, which is not accepted, and the case is appealed to the court of common pleas, the offer follows the case to that court, and is governed by section 5141 of the Revised Statutes; and if, at the trial, the plaintiff does not recover more than was so offered to be confessed, and interest thereon from the date of the offer, he will be liable for the costs of defendant accruing after the offer was made. *Cohon v. Kineon*, 590.

---

 Juries—Lien.
 

---

**JURIES.** See **JURORS.**

*Drawing of.*—Section 5167, Rev. Stats., as amended February 22, 1889 (86 Ohio L. 51), relating to the drawing of grand and petit juries, which provides that the first fifteen drawn "shall be summoned as grand jurors, and those named as the remainder shall be summoned as petit jurors, and in case of challenge, inability to serve, or other cause, it becomes necessary to fill the panel, the whole of the number of persons so summoned as petit jurors shall be first exhausted before resorting to other means to fill the same," gives a rule for the filling of the panel for a petit jury, but does not relate to the filling of the panel for a grand jury. The latter is governed, as heretofore, by sec. 5171, Rev. Stats. *Julian v. State*, 511.

**JURISDICTION.** See **ASSIGNMENT FOR CREDITORS; WIDOW; PROBATE COURT; EXECUTORS AND ADMINISTRATORS.****JURORS.** See **CHALLENGES; CRIMINAL LAW; HOMICIDE; JURIES; FEES AND COSTS.****JURY.** See **DITCHES, 1.****JURY TRIAL—**

*Right of the trial by jury—Appeal—Practice.*—The right to trial by jury does not depend upon the principles upon which relief is asked, but upon the nature and character of the relief sought. If the relief sought is a judgment for money only, the fact that before the adoption of our reformed system of procedure, the proper remedy would have been by a suit in equity, does not affect the right of either party to a trial by jury upon any issue of fact made by the pleadings. *Gunsaulus, Adm'r v. Pettit, Adm'r*, 27.

**JUSTICE OF THE PEACE.** See **ATTACHMENT, 1.****LANDLORD AND TENANT—**

1. *Rental value of premises—Rule of evidence.*—Where a party occupies premises as a tenant upon an uncertain tenure, and suit is brought to recover for use and occupation for the time occupied, the rule applicable to the case is: What was the fair rental value of the premises as occupied under all the circumstances of the case? And it is competent for the defendant to prove the rental value for the time so occupied.
2. *Evidence of value of land not competent.*—In such case evidence of the value of the real estate itself is not competent as bearing upon the question of rental value. *Cohon v. Kineon*, 590.

**LAW OF A GENERAL NATURE.** See **CONSTITUTIONAL LAW, 1.****LAWS OF A SPECIAL NATURE.** See **CONSTITUTIONAL LAW.****LEASE.** See **LANDLORD AND TENANT.****LEGACY.** See **WILL.****LIABILITY OF STOCKHOLDERS.** See **CORPORATIONS, 2; STOCKHOLDERS, 1, 2.****LIEN—**

1. *Lien of feed-stable keeper.*—The lien given the "person" by secs. 3212

---

 Lien at Common Law and by Statute—Limitations of Actions.
 

---

**LIEN—Continued.**

and 3213, Revised Statutes, who furnishes feed and bestows care on a horse or other animal therein named, is a right in the nature of a common law lien to retain possession as a security for the charges; and may be waived by the "person" voluntarily parting with the possession to the owner without the charges being paid.

2. *Waiver of.*—The plaintiff below was the keeper of a feed-stable in the city of Cincinnati. The owner of a horse, who lived out of the city, was in the habit of leaving it with the plaintiff, when in the city, to be fed and cared for as long as suited his convenience; when called for, the horse would be delivered to the owner, and not returned, except at such intervals as suited the owner's convenience when again in the city. The plaintiff kept an account in which the owner was charged with the feed and care of the horse from time to time, as it was left with him. On or about the 12th of November, 1884, the horse was called for and delivered to the owner, as usual; the charges for feed and care then amounted to over a hundred dollars. Shortly afterward the owner was killed by being thrown from his buggy. And some time after that, the horse was driven to the city by a brother of the deceased and left at another feed-stable, from which it was replevined by the plaintiff in an action against certain children of the deceased, who claimed to be the owners of the horse.

*Held:* That the delivery of the horse was a voluntary one, and the lien, waived. Whether an express or implied contract to return the animal would have varied the rights of the parties, is not determined; for the reason, that no express contract was claimed, and none can be implied from the circumstances of this case. *Seebaum v. Handy*, 560.

**LIEN AT COMMON LAW AND BY STATUTE.** See **LIEN**.

**LIEN OF VENDOR.** See **CONDITIONAL SALES**.

**LIFE ESTATE.** See **WIDOW**; **WILL**.

**LIMITATIONS OF ACTIONS.** See **PRACTICE IN CIVIL CASES**, 5.

1. *When statute of limitations begins to run.*—Where an attorney collects money for his client, and uses no fraud or falsehood to him in regard to its receipt, the statute of limitations begins to run from the time of its collection.
2. *Suit by client to recover.*—Where suit is brought by a client against his attorney for money collected and not paid over to him, and it appears on the face of the petition that the collection was made more than six years prior to the commencement of the action, and there is no averment of any misrepresentation or concealment of its collection by the attorney, the petition may be demurred to on the ground that the cause of action is barred by the statute of limitations. *Douglas v. Corry, Executrix*, 349.
3. *Limitation as to partners.*—A cause of action in favor of one partner against his co-partner for an account, accrues upon the dissolution of the partnership, unless there is some agreement, express or implied

**Liquor Laws—Municipal Corporations.**

**LIMITATIONS OF ACTIONS—Continued.**

fixing a period for accounting beyond that time, or circumstances rendering an accounting then impracticable.

4. Such actions are governed by section 4985 of the Revised Statutes, and can only be brought within ten years after the cause of action accrues. *Gray v. Kerr*, 652.

**LIQUOR LAWS.** See CONSTITUTIONAL LAW; LOCAL OPTION, 1.

**LOCAL LAWS.** See CONSTITUTIONAL LAW, 3.

**LOCAL OPTION.** See CONSTITUTIONAL LAW.

The act entitled 'An act to further provide against the evils resulting from the traffic in intoxicating liquors, by local option in any township in the state of Ohio,' passed March 3, 1888, is not in conflict with the constitution, and is a valid law. *Gordon v. The State*, 607.

**MALICIOUS PROSECUTION—**

*Malicious prosecution of civil action—When actionable.*—An action may be maintained for maliciously, and without probable cause, instituting and prosecuting an action in forcible entry and detainer. *Pope v. Pollock*, 367.

**MANDAMUS.** See REMOVAL OF CAUSE.

**MANSLAUGHTER.** See CRIMINAL LAW.

"MARGINS." See CONTRACTS, 5.

**MARRIED WOMEN.** See HOMESTEAD, 1; DOWER, 1, 2, 3.

**MASTER AND SERVANT.** See NEGLIGENCE, 2, 3, 4.

**MINOR.** See INFANT.

**MOB.** See CRIMINAL LAW, 5, 6, 7.

**MORTGAGES.** See DOWER, 1, 2, 3; COLLATERAL SECURITY, 1, 2, 3, 4.

**MORTGAGE, CHATTEL.** See CORPORATIONS, 5.

**MUNICIPAL CORPORATIONS.** See NUISANCE, 1; PUBLIC HIGHWAYS.

1. *Defective sidewalks.*—In an action against a municipal corporation, to charge it with liability to one injured by a defective sidewalk, the cost of repairing which, could have been charged upon the adjoining property, it is no defense to show that the corporate funds had been exhausted in other necessary repairs, and to reject evidence tending to establish that fact is not error.
2. *What is sufficient notice of.*—(a) In an action against a municipal corporation, to charge it with liability to one injured by a defective sidewalk, it can not, as matter of law, be charged with notice of the defect that caused the injury, from the fact, merely, that it knew of the existence of a general defect in the same walk. To constitute knowledge of the general defect, notice of the particular one, they must at least be of the same general character, or the latter a usual concomitant of the former.
3. *Notice to property owners.*—(b) A notice given to a property owner by a municipal corporation to repair a sidewalk, is not, as matter of law, no-

## Murder—Negligence.

**MUNICIPAL CORPORATIONS—Continued.**

tice of any other defect than the one stated in the notice, or of one so related to it, that the existence of the latter, according to the usual course of affairs, may be reasonably inferred from the former. *Village of Shelby v. Claggett*, 549.

**MURDER.** See **CRIMINAL LAW**.

**NATIONAL BANKS.** See **TAXATION**, 3, 4.

**NEGLIGENCE.** See **MUNICIPAL CORPORATIONS**, 1, 2, 3.

1. *Personal injury—Damages—Liability of county agricultural society for.*—A county agricultural society, organized under the act of February 28, 1846 (44 Ohio L. 70), and amendments thereto, which has constructed seats on its fair grounds for the use of its patrons, is liable, in its corporate capacity, to an action for damages, by a person who, while attending a fair held by it, and rightfully occupying the seats, sustains an injury in consequence of its negligence in their construction. *Dunn v. Agricultural Society*, 93.
2. *Contributory—Application of the doctrine to children—Degree of care required of them.*—In the application of the doctrine of contributory negligence to children, in actions by them, or in their behalf, for injuries occasioned by the negligence of others, their conduct should not be judged by the same rule which governs that of adults; and while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them, is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances.
3. *Duties of employers to infant employees.*—Persons who employ children to work with, or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion and care as is usual among children of the same age, under similar circumstances, and are bound to use due care, having regard to their age, and inexperience, to protect them from dangers incident to the situation in which they are placed; and as a reasonable precaution, in the exercise of such care in that behalf, it is the duty of the employer, to so instruct such employes concerning the dangers connected with their employment, which, from their youth and inexperience they may not appreciate or comprehend, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom.
4. *What is not contributory negligence by infants.*—Such employe, who has not been so instructed, and who, while in the discharge of his duty as he understands it, suffers an injury in consequence of the employer's negligence, may maintain an action against the employer therefor, notwithstanding, that, by reason of his youth and inexperience, and the failure of the employer to properly instruct him, he did some act, in the performance of his duty according to the judgment and knowledge he possessed, which contributed to the injury, but which he did not know,



## Negotiable Instruments—Nuisance.

NEGLIGENCE—*Continued.*

and was not advised, would be likely to injure him. *Rolling Mill Co. v. Corrigan*, 283.

5. *Explosion, of steam boiler.*—The plaintiff as an employe of F. & Co., was at work on the premises of the defendants, in helping to set up a saw-mill, which the defendants had purchased of F. & Co. While so at work, a steam boiler, owned and used by the defendants on the premises to run the saw-mill, exploded and injured the plaintiff. *Held*: That in an action for damages, the mere fact of the explosion did not raise a *prima facie* presumption of negligence on the part of the defendants. *Huff v. Austin*, 386.

## NEGOTIABLE INSTRUMENTS. See PROMISSORY NOTES; CHECKS; NOTES AND BILLS.

1. *Rule when payable to fictitious person or order.*—The rule that a negotiable instrument made payable to a fictitious person or order, is, in effect, an instrument payable to bearer, applies only where it is so made with the knowledge of the party making it, and does not apply where the maker, supposing the payee to be a real person and intending payment to be made to such person or his order, is induced by the fraud of another to so draw it.
2. *Check obtained by fraud—Forgery.*—Where, by the fraud of a third person, a depositor of a bank is induced to draw his check payable to a non-existing person, or order, the drawer being in ignorance of the fact and intending no fraud, the bank on which the check is so drawn, is not authorized to pay it and charge the amount to the account of its customer, on the indorsement of the party presenting it, although it appears to have been previously indorsed by the party named as payee. Such indorsement is, in effect, a forgery, and the payment thereon by the bank, confers no right on it as against the drawer of the check.
3. *Duties of banks in relation thereto.*—In the absence of a course of dealing or understanding to the contrary between the parties, the duty of a banker is, in all cases, to pay to the person named, or his order, where the terms of the check are such, and he may, and should withhold payment until fully satisfied as to the genuineness of the indorsement. *Armstrong v. National Bank*, 512.

## NEW TRIAL. See ERROR.

## NON-USER. See ABANDONMENT; PUBLIC HIGHWAYS, 1, 2.

## NOTICE. See RAILROADS, 1, 2; CONSTRUCTIVE NOTICE; MUNICIPAL CORPORATIONS, 2, 3.

## NUISANCE—

*Action for—When abates.*—An action against an incorporated village founded upon a petition alleging in substance that a street much used by the citizens and the public, was so unskillfully and negligently constructed and left by the defendant as to be in an unsafe and dangerous condition, and allowed to become out of repair and obstructed by the

---

 Offer to confess Judgment—Pleadings.
 

---

 NUISANCE—*Continued.*

rubbish and refuse of the village, so that it was highly dangerous, and that the plaintiff, while lawfully passing along the street, accidentally and without fault or negligence on her part, was precipitated down an embankment, whereby she was greatly bruised and injured, for which damages she asks judgment, is an action "for a nuisance" within the meaning of section 5144, Rev. Stats., and abates at the death of the party injured. *Village of Cudington v. Adm'r of Fredericks*, 442.

OFFER TO CONFESS JUDGMENT. See JUDGMENT.

OPINION. See WITNESS, 3.

ORAL TESTIMONY. See CONTRACTS, 1.

"ORDINARY CARE." See NEGLIGENCE.

ORDINANCE. See ASSESSMENTS; STREET IMPROVEMENT.

PAROL EVIDENCE. See TRUSTS, 1.

PARTICEPS CRIMINIS. See CONTRACTS, 6.

PARTIES. See CONTRACTS.

PARTITION. See HOMESTEAD, 2.

## PARTNERSHIP—

*Accounting after dissolution.*—The obligation of a partner to account with his co-partners after the dissolution of the partnership, where there has been no fraudulent application or investment of the partnership property by him, nor agreement making him the liquidating partner, or otherwise giving him possession or control of the partnership assets, is not a continuing or subsisting trust within the meaning of sec. 4974 Revised Statutes. *Gray v. Kerr*, 652.

PAYMENT. See PLACE OF PAYMENT.

PENDING ACTION. See REMOVAL OF CAUSE, 1, 2.

*Pending proceedings—Not affected by amendments of statutes.*—Any judgment or final order rendered before § 6723, Rev. Stats., as amended March 28, 1889, took effect (October 1, 1889), may be reviewed on a proceeding in error commenced within two years from the time the judgment or order was rendered. *Trustees of Canaan Township v. Board of Infirmary Directors*, 694.

PERSONAL INJURY. See NEGLIGENCE; DAMAGES.

PETITION IN ERROR. See PRACTICE IN CIVIL CASES.

PLACE OF PAYMENT. See COLLATERAL SECURITY, 5, 6.

PLEADINGS. See PRACTICE IN CIVIL CASES; INSURANCE, 1; CONTRACTS, 3; CORPORATIONS; ANIMALS, 2.

*Indefiniteness in.*—Indefiniteness in pleading should be taken advantage of by motion and not by demurrer; so that, where the language of a pleading will fairly admit of a construction that will sustain it as against a demurrer, it should, in the absence of a motion to make definite and certain, be so construed. *Railway Co. v. Iron Co.*, 44.

PLEDGE. See COLLATERAL SECURITY, 2, 3, 4, 5, 6; BAILMENT.

## Power of Attorney—Practice in Civil Cases.

POWER OF ATTORNEY. See WARRANT OF ATTORNEY.

POWERS. See TRUST, 10.

PRACTICE IN CIVIL CASES. See ATTACHMENTS; ANIMALS; INSURANCE, 1; JURY TRIAL, 1; PLEADINGS, 1; CORPORATIONS; CONTRACTS ERROR; WIDOW; PROMISSORY NOTES, 2, 3; ANIMALS, 2; REAL ACTIONS; PENDING ACTION.

1. *Petition in*—*Amendment not allowed after statute of limitations has run.*—Where the plaintiff in a real action omits to describe in his petition all the lands detained from him by the defendant, he can not by an amendment to his petition, made after the statute of limitations has run as to the land omitted, include such omitted land and have the amendment relate to the filing of the petition, so as to defeat the plea of the statute as to the lands brought in by the amendment. *Hills v. Ludwig*, 373.

*Cross-petition in error*—*When to be filed.*—A defendant in error against whom, as cross-petitioner in the trial court, a judgment had been rendered which is in favor of all the other parties to the suit, and to which no error is assigned by another party, is required to file his cross-petition in error within two years after the rendition of such judgment, in order to obtain its reversal. *Mannix, Assignee, v. Purcell et al.*, 102.

3. *Refusal to consider inconclusive evidence, not error to substantial rights.*—Where, in an action on an indorsement, evidence is offered by the defendant in support of averments in his answer, which, if true, would make the enforcement of the indorsement operate contrary to the contemporaneous agreement of the parties and a fraud on the rights of the indorser, the liberal principles of our code would, in a trial to the court, authorize it to receive the evidence and permit an amendment of the pleadings; but where the evidence is contradictory and inconclusive, the refusal of the court to consider the evidence, is not error to the prejudice of the substantial rights of the indorser. *Farr v. Ricker*, 265.

4. *Supersedas*—*Stay of judgment.*—In the circuit court of Lucas county, the judgment of the court of common pleas, in favor of Neubert and against Phillips in a suit brought to recover the possession of certain land, was reversed and the cause remanded for a new trial; and a proceeding in error, brought by Neubert against Phillips, is now pending in this court for a reversal of the judgment of the circuit court, and an affirmance of the common pleas; and the present application is for a stay of the judgment of the circuit court, until the final disposition of the proceeding in error here

*Held:* That this is not the proper practice in a case of this kind; *Schaeffer v. Marienthal*, 17 Ohio St. 183, 188 That the plaintiff in error here should apply to the court, to which the cause has been remanded for further proceedings, for a continuance of the cause until the final disposition of the case on error in this court. The court to which the cause has been remanded, may, in the exercise of a sound discretion, so continue it; but if it does not, the party making the application may save his rights by excepting to the overruling of his motion. *Neubert v. Phillips*, 559.

---

 Practice in Criminal Cases—Promissory Notes.
 

---

PRACTICE IN CIVIL CASES—*Continued.*

5. An action does not lie to enjoin the collection of an assessment made under the two-mile assessment pike law, on account of defects or irregularities apparent on the proceedings had before the county commissioners to cause the improvement to be made; the appropriate remedy for such defects and irregularities is by petition in error (*Haff v. Fuller*, 45 Ohio St. 495). *Lewis et al. v. Laylin et al.*, 663.

## PRACTICE IN CRIMINAL CASES. See CRIMINAL LAW.

## PRE-EXISTING DEBT. See FRAUD, 1, 2.

## PRE-DECEASED DEVISEE. See WILL, 2, 3.

## PREFERRED CREDITORS. See CORPORATIONS, 5.

## PREVIOUS DECLARATIONS. See WITNESS.

## PRINCIPAL AND ACCESSORY. See CRIMINAL LAW.

## PRIORITY OF LIENS. See CORPORATIONS.

## PROBATE COURT. See EXECUTORS AND ADMINISTRATORS; WIDOW; ASSIGNMENT FOR CREDITORS; JURISDICTION.

## PROMISSORY NOTES—

1. *Blank indorsement—Parol testimony not admissible to vary.*—The indorsement of a negotiable promissory note, made to transfer the title to one who has purchased it for value, is, though in blank, an abbreviated contract in writing, whereby the indorser binds himself to pay the note if on presentment the maker does not, and due notice is given him of such non-payment; and, in the absence of fraud or mistake, the legal effect of such indorsement cannot be varied by parol.
2. *May be reformed in equity—Proof required.*—A blank indorsement may, like any other written agreement, be reformed upon equitable principles, in an action on the indorsement, for the purpose of a defense. In such action the cause of reformation should be stated by way of cross-petition with a prayer for such relief; and the averments should be supported by clear and convincing proof, to warrant the relief. *Farr v. Ricker*, 265.
3. *When interest payable semi-annually not usurious.*—A promissory note bearing interest at the rate of eight per cent. per annum, payable semi-annually, is not usurious, although it stipulates that the semi-annual installments of interest shall bear interest at the same rate if not paid when due. *Taylor et al. v. Hiestand & Co.*, 345.
4. *Time of payment, controlled by separate written agreement.*—The time of payment as fixed by a note, may be controlled by a separate written agreement made and entered into by the parties at the time of execution of the note.
5. *Holder with notice governed by this agreement.*—A made and delivered to B his promissory note for the payment of a certain sum of money thirteen months after date. They also, concurrently therewith, made and entered into a separate written agreement, that the note should not be

## Proof—Railroads.

PROMISSORY NOTES—*Continued.*

come due and payable until C (for whom B was acting as agent), should sell for A a certain number of bushels of oats at a certain price.

*Held* : That an action on the note cannot be maintained until the terms of the concurrent written agreement have been complied with : And further, that such is the rule in an action by a holder, who acquired his title with notice of the agreement.

6. *Illegal consideration, may be shown by one in pari delicto.*—The maker, when sued upon a note, may, as a defense, show that it is founded upon an illegal agreement, although it appears that he is *in pari delicto*, where the suit is by a party to the agreement, or by one having acquired his title with notice. *Jacobs v. Mitchell*, 601.

PROOF. See BURDEN OF PROOF.

PROSECUTING ATTORNEY. See ATTORNEY-AT-LAW; APPEAL, 2 COUNTY COMMISSIONERS.

## PUBLIC HIGHWAYS—

1. *Abandonment by non-user.*—Under a claim of abandonment of a road in a municipal corporation, proof that no work had been done on the road by the public authorities for fifteen years; that the road was at times in bad condition and impassable; that it passed over a steep hill; was difficult of use; that a new road had been established in the vicinity intended to take its place; that for eleven years before suit was brought travel had been substantially diverted to the new road, and that portions of the old road had been fenced in, are not sufficient to show abandonment by the public.
2. *When complete.*—If non-user of such road may work an abandonment of it, the non-user must be shown to have extended over a period of twenty-one years. *Nail & Iron Co. v. Furnace Co.*, 544.

## PUBLIC SCHOOLS—

*Public school property.*—Public school property, real or personal, that has been appropriated and set apart by a township board of education for the purpose of a public school of a higher grade than primary, for the benefit of the youth of the whole township, does not pass to or vest in the board of education of a separate school district that may be afterwards organized out of the territory within which the property happens to be situated, although the property falls within the letter of section 3972 Rev. Stats., which is the section of the school law relating to the subject. *Board of Education v. Board of Education*, 595.

QUORUM. See REMOVAL OF CAUSE.

RAILROADS. See CORPORATIONS, 3, 4; TAXATION, 1, 2.

1. *Statutory duty of railroad company to fence its track—Agreement of land owner to fence—Whether it runs with the land as a burthen—Purchaser without notice.*—A written agreement by the grantor of the right-of-way to a railroad company, to fence it on each side through his lands, will not affect the right of a subsequent purchaser to require the company to fence its road, under the provisions of sections 3324 and 3325, Rev.

---

Real Actions—Removal of Cause.

---

RAILROADS—*Continued.*

- Stats., where the purchase was made without actual or constructive notice of the existence of such agreement.
2. *Constructive notice, what is.*—Such agreement not being recorded, the mere use and occupation of the right-of-way by the company and its successors for the purpose of a railroad, will not constitute constructive notice of the existence of such agreement. *Railway v. Bosworth*, 81.
  3. *Damage to stock—Fencing.*—Where, in an action for damages to stock, brought against a railroad company on the ground of negligence in failing to maintain a fence between the company's right-of-way and the land of the plaintiff, the defense interposed is that in the condemnation proceeding by which the company's right-of-way was acquired, the expense of fencing was taken into account by the jury, and included in the verdict, and the company, to sustain such defense, gives in evidence the record of the proceeding, and the record is silent on the subject, no presumption arises that the matter of building and maintaining fences along the line of the railroad was considered, and compensation to the owner therefor awarded in the verdict.
  4. *Change of name.*—The question whether the terms of a statute authorizing a change of name on the part of a railroad company upon the making of certain subscriptions authorized by the same act, has been complied with or not, is, where pertinent, a proper subject of allegation, and courts will not take judicial notice of a statement in a report of the commissioner of railroads to the effect that the terms of the statute have been complied with, and the name of the company changed. *Railroad Co. v. Hoffhines*, 644.

**REAL ACTIONS.** See PRACTICE IN CIVIL CASES, 5.

**RECONVEYANCE.** See PROBATE COURT; ASSIGNMENT FOR CREDITORS, 1.

**RECORD.** See BILL OF EXCEPTIONS, 1, 2.

**REFORMATION OF INSTRUMENTS.** See PROMISSORY NOTES, 2.

**RELIGIOUS SOCIETY.** See TRUSTS.

**REMEDIAL LAW.** See VALIDITY OF STATUTE; STATUTE, VALIDITY OF; PENDING ACTIONS; REMOVAL OF CAUSE.

**REMOVAL OF CAUSE.** See PENDING ACTION.

1. *Validity of act of March 18, 1881, amending sec. 550, Rev. Stats.*—The act passed March 19, 1887 (84 Laws, 129), amending sec. 550, Revised Statutes, was duly adopted by the General Assembly, and is a valid law.
2. *Amendment of remedial Statute—Construction of language.*—The statute relates to the remedy, and must be construed in connection with sec. 79, Revised Statutes; so that, the language therein contained, "That in every instance where a judge of the court of common pleas is interested in the event of a cause \* \* pending before the court in any county of his district," it may, "unless there is a judge residing in the county not so interested," be removed to another county, does not, though general in form and expressed in the present tense, apply to a

---

Rents and Profits—Sidewalk.

---

**REMOVAL OF CAUSE—Continued.**

pending action, where the state of facts, constituting such ground of removal, existed at the adoption of the statute. No generality of language used in an amendment relating to the remedy, will, under sec. 79 Revised Statutes, make it applicable to a pending action, prosecution or proceeding; to make it so applicable the intention must be expressed in a provision to that effect. *State ex rel. Construction Co. v. Rabbitts*, 178.

**RENTS AND PROFITS.** See **TENANTS IN COMMON**, 1, 2.

**REPEAL.** See **JUDICIAL SUBDIVISIONS**; **REMOVAL OF CAUSE**.

**RETROACTIVE LAW.** See **ASSESSMENTS**.

**REVISED STATUTES.** See **TABLE OF STATUTES CONSTRUED, EXAMINED, CITED, ETC.**

**RIGHT-OF-WAY.** See **RAILROADS**, 1, 2.

**RIOT.** See **CRIMINAL LAW**.

**ROADS.** See **PUBLIC HIGHWAYS**.

**RULES OF CONSTRUCTION.** See **REMOVAL OF CAUSE**, 2;

1. *Ambiguous words and phrases.*—Where the same word or phrase is used more than once in the same act in relation to the same subject-matter and looking to the same general purpose, if in one connection its meaning is clear and in another it is otherwise doubtful or obscure, it is in the latter case to receive the same construction as in the former, unless there is something in the connection in which it is employed, plainly calling for a different construction. *Rhodes v. Weldy*, 234.
2. (a) *Records of inferior tribunals.*—In construing the records of inferior tribunals, acting within the scope of their authority, to ascertain whether or not they have followed certain statutory requirements, technical precision will not be required; it will be sufficient if it appear, though informally, from a reasonable construction of the whole transcript of the proceedings, that these requisites have been observed.
- (b) Where the transaction is one extending over a considerable period of time, and requires acts to be done and orders made on different days, it is not essential that the entry recording each separate act should be complete in itself, for it will be aided, if possible, by construing it in connection with what has been already recorded or embodied in written orders that are part of the transcript. *Lewis et al. v. Laylin et al.*, 663.

**RUNNING WITH LAND.** See **RAILROADS**, 1.

**SALE.** See **CONDITIONAL SALES**.

**SCHOOL LANDS.** See **PUBLIC SCHOOLS**.

**SCHOOLS.** See **PUBLIC SCHOOLS**; **CONSTITUTIONAL LAW**, 3.

**SELF-DEFENSE.** See **CRIMINAL LAW**, 6, 7.

**SERVICE.** See **SUMMONS**.

**SHERIFF AND CONSTABLE.** See **ATTACHMENT**, 3.

**SIDEWALK.** See **NEGLIGENCE**; **MUNICIPAL CORPORATIONS**, 1, 2, 3.

## Special Venire—Surety.

**SPECIAL SCHOOL DISTRICTS.** See CONSTITUTIONAL LAW, 3.

**SPECIAL VENIRE.** See JURIES.

**STATUTE, CONSTITUTIONALITY OF.** See CONSTITUTIONAL LAW.

**STATUTE, VALIDITY OF.** See REMOVAL OF CAUSE, 1; CONSTITUTIONAL LAW, 5.

**STATUTE, CONSTRUCTION OF.** See TAXATION, 2; REMOVAL OF CAUSE, 1, 2; RULES OF CONSTRUCTION, 1, 2.

**STATUTE OF LIMITATIONS.** See ATTORNEY-AT-LAW, 2, 3; REAL ACTIONS, 1.

**STOCK.** See CORPORATIONS; STOCKHOLDERS.

**STOCKHOLDER.** See CORPORATIONS; STOCKHOLDERS.

**STOCKHOLDERS.** See APPEAL, 1; CORPORATIONS, 1, 2, 3; TAXATION, 1

1. *Transfer of stock—How made.*—Where the vendor causes an entry of transfer to be made by the secretary of the company, in a book then present at the company's office other than the stock book, with the expectation that it will be entered in another book then at the residence of the secretary, but no transfer is made in the stock book of the company, and, at the time of the accruing of the debts of the corporation, and at the time of the trial, such vendor appears, by the stock book, to be the owner of the shares, such entry of transfer is not sufficient to relieve the vendor of liability to the creditors of the corporation, notwithstanding the fact that the sale was made in good faith and for value, and that the vendor believed he had done all that was necessary to effect a transfer of the stock, and the further fact that the company thereafter treated the purchaser as the owner of the stock so sold.
2. *Statutory liability of.*—A stockholder who, in good faith, sells and transfers his stock to one who afterwards becomes insolvent, is liable to creditors of the corporation, for such portion only of the debts existing while he held the stock, and remaining due, (not in excess of the amount of stock assigned) as will be equal to the proportion which the capital stock assigned by him bears to the entire capital stock held by solvent stockholders within the jurisdiction, liable in respect of the same debts, to be ascertained at the time judgment is rendered. *Harpold v. Stobart*, 397.

**STREETS.** See MUNICIPAL CORPORATIONS; PUBLIC HIGHWAYS.

**STREET IMPROVEMENT.** See ASSESSMENTS.

**SUMMONS—**

*When person privileged from service of.*—A person attending the hearing of an application for an injunction in a case in which he is interested as a party, in a county other than that of his residence, is privileged from the service of summons while going to, attending, and returning from, the place of such hearing. *Andrews v. Lembeck*, 38.

**SURETY.** See BOND; EXECUTORS AND ADMINISTRATORS, 1, 2; ASSIGNMENT FOR CREDITORS, 2.



## TAXATION—

1. *When shares of stock in foreign corporations, held by residents of Ohio, liable to.*—The provision of section 3 of the act of April 5, 1859, (S. & C. 1438), that "no person shall be required to include in his statement as a part of the personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, which he is required to list, any share or portion of the capital or property of any company or corporation, which is required to list or return its capital and property for taxation in this state," does not apply to shares of a foreign corporation, although the capital of the corporation is taxed in the state where located, and although the corporation has substantial property in Ohio, on which it pays taxes here; nor does it apply to shares of a railroad company which is formed by the consolidation of an Ohio company with companies of other states, notwithstanding such company pays taxes in Ohio on the portion of its property which is situated here.
2. *Effect of construction of tax laws, by officers having enforcement of same.*—A construction, by officers having the enforcement of the tax laws of Ohio, since the enactment thereof, to the effect that, under such laws, shares held by residents of Ohio of stock of foreign railroad corporations having property in this state on which they pay taxes, and of consolidated railroad companies, are not taxable in Ohio, does not bind the successors of such officers, nor the state, in the proper assessment and collection of taxes upon such shares. *Lee, Treas. v. Sturgess. Insurance Co. v. Ratterman, Treas.*, 153.
3. *National bank stock.*—There is no authority in the statutes of the state, nor of the United States, for listing and valuing the shares in a national bank in the aggregate, and placing such aggregate on the tax-list in the name of the bank. Such shares, when listed and valued for taxation, are required to be placed on the proper tax-list in the names of the respective owners.
4. *How listed for taxation.*—The listing of the shares for taxation is provided for and secured by § 2765, R. S.; and the correction of returns made by the cashier of the bank to the county auditor, is provided for by § 2769 and not by § 2782, R. S. *Miller, Treas. v. The First National Bank*, 424.

TELEGRAPH COMPANY. See TAXATION.

TENANTS IN COMMON. See HOMESTEAD, 2.

1. *When liable for rents and profits.*—By virtue of section 5774 (Revised Statutes), which provides that one tenant in common may recover from another his share of rents and profits received by such tenant in common from the estate, "according to the justice and equity of the case," a tenant in common who uses the common estate simply to pasture his cattle, is liable to account to his co-tenants for their share of the value of such use as for rents and profits received.
2. *When not liable for interest.*—Where no demand has been made upon such tenant in common, either for the possession of the premises or for the value of their use, before the commencement of the action, he is not

---

 Title—Trust.
 

---

TENANTS IN COMMON—*Continued.*

liable to account for interest upon the amount found due his co-tenants for such use. *West v. Weyer*, 66.

TITLE. See INCUMBRANCES; CAVEAT EMPTOR; EXECUTORS AND ADMINISTRATORS, 4.

TRESPASSING ANIMALS. See ANIMALS.

TRUST. See ATTORNEY-AT-LAW, 1, 2; PARTNERSHIP; ASSIGNMENT FOR CREDITORS; EXECUTORS AND ADMINISTRATORS.

1. *Trusts for charitable uses—Parol evidence of.*—It is competent to prove by parol evidence that land conveyed to a grantee by a deed absolute on its face, is in fact held by him in trust for charitable uses, but such evidence should be clear, convincing and conclusive.
2. *Archbishop of Roman Catholic Church—His title to church property—Church canons as evidence.*—Where such grantee is in fact archbishop of the Roman Catholic Church for his diocese, its canons and decrees, regulating the mode of acquiring and holding church property, are competent evidence to show that the property so held by him is held in trust for purposes of public religious worship and other charitable uses.
3. *Such trusts cognizable by courts.*—Such a trust is one of which the courts will take cognizance and assume control for the purpose of preventing its abuse, perversion or destruction.
4. *Each piece of church property held upon a separate trust.*—Where such property is held by the archbishop in trust to be devoted to the uses of public religious worship, cemeteries, orphan asylums and schools, each church, cemetery, asylum and school is held upon a separate trust and for its own separate uses, and one piece of property so held is not chargeable with any part of the expense of improving another, nor of improving church property generally in the diocese.
5. *Individual assignment of archbishop to pay debts—What passes.*—Property held upon such trusts by the archbishop does not pass to his assignee in insolvency by a deed of assignment made in his individual capacity for the payment of his individual debts. Such an assignment passes to the assignee no better or different title to the assigned property than the assignor held, and *cestuis qui trustent* may assert, as against the assignee and the creditors of the assignor, the same rights that they could against the latter if no assignment had been made.
6. *Unincorporated beneficiaries of church property—What standing in court.*—Though the several congregations of the churches so held in trust, and the persons respectively possessing and having charge of such schools, cemeteries and asylums, are severally unincorporated and otherwise incapable of holding the legal title to the property so used, they nevertheless have such an interest in the trust property as permits them to be represented in court by a number less than the whole, having a common interest with them, for the purpose of protecting the property from seizure and sale for the satisfaction of the private debts of the trustee.

## Turnpikes—Two-mile Assessment Pike Law.

## TRUST—Continued.

7. *Effect of changes in membership—Identity of congregation.*—Changes in the membership of such congregations and bodies do not affect their legal identity; and for the purposes of continuing and enjoying the uses to which the properties respectively possessed by them are devoted they respectively remain, in legal contemplation, the same congregations and and bodies.
8. *Nature of interest in church property.*—It is not essential to the existence or enjoyment of a trust for charitable uses that the individual beneficiaries are able to show that they contributed to, or have a personal, pecuniary interest in, the trust property; their interest is measured by, and limited to, the uses for which the property is held.
9. *Advances by trustee to improve trust property—Claim for, passes to assignee.*—Where such trustee has made advances from his own private means, otherwise than as donations, to assist in buying or improving the trust property, he has a claim upon the particular property so purchased or improved which passes to his assignee in insolvency as individual assets; and in a proceeding by the assignee to subject the assets of his assignor to the payment of his debts, it is competent for the court to order an accounting of the advances so made, with a view to subjecting such property to the satisfaction of such claim.
10. *Power of trustee to charge trust property for its preservation.*—Such trustee has power, by contract, to charge the trust property with the reasonable expense of its necessary preservation, improvement and repair, in favor of one who expends money, labor or materials for that purpose. *Manix, Assignee v. Purcell, et al.*, 102.

**TURNPIKES.** See TWO-MILE ASSESSMENT LAW.

## TWO-MILE ASSESSMENT PIKE LAW--

1. *What sufficient stating of lands to be assessed.*—Where county commissioners in the course of proceedings had before them under the two-mile assessment pike law, have before them and are considering the reports of the viewers and surveyor, which recommend the improvement to be made, and which also name the lots and lands that will be benefited by the improvement and ought to be assessed therefor, an order made by them directing the improvement to be "made in accordance with the report of the viewers and surveyor," is a sufficient stating of the lands which shall be assessed to pay the expense thereof.
2. *Notice to apportioning committee.*—Where the notice to the apportioning committee of their appointment states that they have been "appointed as a committee to apportion the estimated expense thereof (of improvement) upon the real property embraced in the order aforesaid," and directs them to apportion the same "according to the benefits to be derived therefrom;" and a list of the lots and lands made by the viewers and surveyor is attached to the notice, it is to be regarded as part thereof, though the notice, proper, does not, in direct terms, make it so, nor expressly refer to this list.

---

 Usury—Warrant of Attorney.
 

---

Two-mile Assessment Pike Law—*Continued.*

3. *Report of committee.*—Where the report of the apportioning committee shows that they acted under this notice and returned to the auditor and commissioners a list of the lots and lands they had assessed, and the respective sums assessed on each, it will be presumed, in the absence of any evidence to the contrary, that they followed the law and their instructions in the mode of making it.
4. *Authority to improve roads within a municipal corporation.*—County commissioners have authority under the two-mile assessment pike law to improve a state, county or township road, although the improvement embraces that part of the highway which lies within the limits of a municipal corporation. *Lewis et al. v. Laylin et al.*, 663.

USURY. See PROMISSORY NOTES, 3.

## VACATING JUDGMENT—

1. An order of the court of common pleas, made on motion of the defendant, and vacating a default judgment entered at a previous term, for irregularity in obtaining the same, is an order affecting a substantial right made upon a summary application after judgment, and may be reversed, vacated, or modified for errors appearing on the record.
2. Although the court may have decided that there is good ground to vacate on motion such judgment rendered on default at a preceding term, it is error to vacate the same before it has been adjudged that there is a valid defense to the action; and if, on error, such adjudication is not shown by the record, it will not be presumed.
3. B. at the January term, A. D. 1835, of the court of common pleas, recovered a judgment by default against H. At the next term, H. moved to set aside the judgment for irregularity in obtaining the same, which motion was granted, the judgment vacated, and ten days allowed in which to file answer. *Held*: This was error. *Frazier v. Williams*, 24 Ohio St. 625, followed and approved. *Braden v. Hoffman*, 639.

VALIDITY OF STATUTE. See REMOVAL OF CAUSE, 1.

VENDOR AND PURCHASER. See CONDITIONAL SALES.

VENIRE. See JURIES.

VENUE. See REMOVAL OF CAUSE.

VOLUNTARY PAYMENT. See CORPORATIONS, 4.

WAIVER. See LIEN, 2.

WAREHOUSEMEN. See BAILMENT; ESTOPPEL.

WAREHOUSE RECEIPTS. See BAILMENT.

WARRANT OF ATTORNEY. See COGNOVIT; JUDGMENT BY CONFESSION; PROMISSORY NOTES; NOTES AND BILLS; ERROR; CONTRACTS.

1. *Construction of.*—A warrant of attorney to confess judgment should be strictly construed.
2. *Authority to confess judgment—When summons required—Error.*—A warrant of attorney attached to a sealed note payable to the payee or bearer, authorized "any attorney-at-law, at any time after the above sum

## Way—Will.

WARRANT OF ATTORNEY—*Continued.*

becomes due, with or without process, to appear for us in any court of record in the state of Ohio, and confess judgment against us, for the amount then due thereon, with interest and costs, and to release all errors and the right of appeal," *Held*:

- (a) Such warrant of attorney conferred no authority to confess judgment against the maker of the note, in favor of the holder to whom the payee had transferred the note by delivery.
- (b) In an action on the note, it was error to render judgment against the maker thereof in favor of such holder, by virtue of such warrant of attorney, without summons or other notice to the maker of the bringing of the action. *Spence v. Emerine*, 433.

WAY. See RIGHT-OF-WAY; RAILROADS; EASEMENTS.

WIDOW. See WILL, 4.

1. *Allowance for year's support—Application to probate court for review—Order overruling, is final—Appeal.*—The order of a probate court overruling an application of a widow for a review of the allowance made her by the appraisers for a year's support from the estate of her deceased husband, under section 6043, Revised Statutes, is an adjudication of the rights of the widow and other persons interested as to the question of allowance, and, unless such order is vacated by appeal, or other proper proceeding, is a final determination between them. *Moore v. Adm'r of Moore*, 89.

WILL. See EXECUTORS AND ADMINISTRATORS; DOWER; WIDOW.

1. *Provisions for after-born child.*—Where a testator devised his real estate to his wife for life, "and after her death to the heirs of her body begotten," a child born to him after the execution of the will is not "provided for in the will," in the sense of section 5959, Rev. Stats., which provides that: "If the testator had no children at the time of executing his will, but shall afterward have a child living, or born alive after his death, such will shall be deemed revoked, unless provisions shall have been made for such child by some settlement, or unless such child shall have been provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption or revocation shall be received." *Rhodes v. Weldy*, 234.
2. *Devise to children as a class, one or more of whom predecease testator.*—The provision of the statute of wills providing against the failure of a devise to a child or other relative of a testator by the death of the devisee in the life of the testator, (§ 5971 Rev. Stat.) applies to a devise to "children" as a class.
3. *Section 5971, construed.*—P. executed his will in 1868 and died in 1884. Among other objects of his bounty, there were living at the date of the will, his wife, his son Isaac and four children of the latter, James, Michael, Almira (intermarried with W.) and Nancy (intermarried with C.), all of whom were adults. He devised all his estate to his wife for life,

## Witness.

## WILL—Continued.

and directed that, at her death, the land should be converted into money and, with other funds arising from his estate, divided into four equal parts, one of which he directed to be invested in lands and conveyed to his son Isaac for life, remainder to his children in fee-simple. The wife, his son Isaac and the latter's two daughter's Almira and Nancy, died before the testator—the daughters intestate, but each leaving issue surviving the testator. *Held*: That under the provisions of the statute then in force relating to a devise to a child or other relative of the testator (63 Laws, 47 § 56), incorporated in § 5971 Revised Statutes, the surviving issue of each of the two daughters of Isaac take the share of the devise to Isaac's children, which the deceased mother would have taken, had she survived the testator. *Woolley et al. v. Paxon et al.*, 307.

4. *Devise of personally to wife, with unconsumed remainder to heirs.*—A testator bequeathed all his personal estate, after the payment of his debts and funeral expenses, to his wife, and at her death, "said personal estate, or so much as shall be unconsumed, to be equally divided between" his heirs, naming them. The wife survived the testator, and accepted the provision made for her in the will. The executor paid the debts and funeral expenses, and delivered the balance of the personal estate to the widow, and settled his accounts accordingly. The will did not require or direct the executor to collect or distribute the personal estate that might be left unconsumed at the death of the widow, or enjoin upon him any duty with respect thereto. *Held*:
  1. After the debts and funeral expenses were paid, the widow became entitled to the possession, use and enjoyment of the personal estate, with the right to consume the whole or any part of it and it was the duty of the executor to deliver possession thereof to her.
  2. When the executor performed that duty, he administered the estate and executed his trust, and can not be held responsible for any use or disposition made by the widow, of such personal estate after it so lawfully came to her possession; nor can he thereafter be required to account therefor. *Posegate v. South et al.*, 391.

## WITNESS—

1. *Previous declarations.*—A party who calls a witness, and is taken by surprise by his unexpected, and unfavorable testimony, may interrogate him in respect to declarations and statements previously made by him, which are inconsistent with his testimony, for the purpose of refreshing his recollection, and inducing him to correct his testimony, or explain his apparent inconsistency; and for such purpose his previous declarations may be repeated to him, and he may be called upon to say whether they were made by him.
2. *Can not be contradicted by party calling him.*—In case the witness denies having made such statements, or his answer is ambiguous concerning them, it is not competent for the party calling him, to prove them by other witnesses. *Hurley v. State*, 320.

---

Written Instruments—Year's Allowance to Widow.

---

## WITNESS—Continued.

3. *Non-professional—When may give opinion.*—A non-professional witness who has had opportunities to observe a sick or injured person, may give in evidence his opinion of the condition of such person, in respect of his being weak and helpless, or not, and of the degree of suffering which he endured, provided such opinion is founded on his own observation of the person to whom his evidence relates, and is limited to the time that the person was under the observation of the witness. *Village of Shelby v. Claggett*, 549.

WRITTEN INSTRUMENTS. See CONTRACTS, 1, 2, 3, 4.

YEAR'S ALLOWANCE TO WIDOW. See WIDOW.

100 00





